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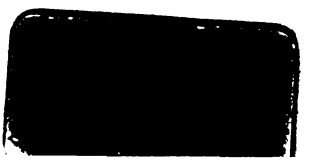

INTERNATIONAL LAW.

VOL. IV.

PRINTED BY
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LONDON

COMMENTARIES

UPON

INTERNATIONAL LAW.

PRIVATE INTERNATIONAL LAW

OR

COMITY.

BY THE LATE

SIR ROBERT PHILLIMORE, BART., D.C.L.

MEMBER OF HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,
AND JUDGE OF THE HIGH COURT OF ADMIRALTY.

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'Plaisante justice qu'une rivière ou une montagne borne!'—PASCAL, *Pensées*, Part i. art. vi. s. 8.

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BY THE AUTHOR'S SON

SIR WALTER G. F. PHILLIMORE, BART., D.C.L.

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AND

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OF CH. CH. OXFORD, AND LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE

TO

THE THIRD EDITION.

It was stated in a prefatory note to the third edition of the third volume of these Commentaries, that the author, Sir Robert Phillimore, died while that volume was passing through the press.

For the third edition of this fourth and last volume he had collected some materials, but had not made other provision.

In these circumstances we have prepared the present edition of the fourth volume; and it only remains to explain to the reader what has been done, what part of this edition has the weight of the author's authority, and what part rests upon the editors alone.

Our additions to the original work are enclosed in square brackets. They consist either of new matter, such as new laws, treaties, or judicial decisions; or of additional illustrations from the foreign codes; or of certain corrections. These the change of time or circumstance, and the alteration of the English judicial

system and procedure under the Judicature Acts, and of substantive law with regard to married women, bills of exchange, and some other subjects, have rendered necessary.

Besides this addition of new matter, we have undertaken the verification of the many quotations and references which are to be found in the former editions. All have been revised and corrected after careful comparison with the original authorities.

We have not thought it necessary to mark with brackets either the corrections which we have been thus led to make, or some occasional emendations of clerical or press errors in the body of the book. In all other respects the original text remains unaltered; and any passage not enclosed in brackets is the work of the author.

It has been our study to make the book thoroughly accurate and full; and we believe that the new matter which we have introduced will make the book complete down to the date of the present publication.

WALTER G. F. PHILLIMORE.
REGINALD J. MURE.

August, 1889.

PREFACE

TO

THE FIRST EDITION.

I. I HAVE endeavoured, in the publication of this last volume of my Commentaries upon International Law, fully to redeem the pledge given in the first chapter of the first volume (*a*).

Professional avocations have interrupted and delayed till now the complete execution of my original design.

The former volumes, in accordance with the plan of that design, treated of the relations, and the laws which govern the relations, between independent States, or, in other words, they were occupied with the consideration of *Jus inter Gentes*, or *Public International Law*.

This volume is devoted to the consideration of *Jus Gentium—Private International Law*, or *Comity*; that is, strictly speaking, the law which ought to

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(*a*) Vol. i. § xvi.

govern the legal relations of individuals not being the subjects of the State which administers the law. Practically speaking, however, it embraces also the legal relations of persons domiciled, or, in some cases, only resident, abroad ; and rights acquired abroad, or existing in objects situate abroad.

This subject has been treated of, till lately, under the title of the *Conflict of Laws*—a title which I think has been justly censured as expressive of a limited and unsound view of this important portion of jurisprudence ; but under which title so able a treatise has been written by Story, substantially upon Private International Law, as perhaps to render some apology necessary on the part of any subsequent writer who publishes a treatise on the subject, even on the assumption that he adopts a sounder theory and a more correct title.

My apology, if one be needed, is, that the treatment of this subject was necessary to the completion of the plan upon which my Commentaries upon International Law were written.

II. The end of all justice, wheresoever administered, is correctly stated by the Roman lawyers, *suum cuique tribuere*—to give to each person his own, his due, his right, his *jus*, be he subject or foreigner.

The inquiry, What is the *jus* of an individual ? shows that it must be attached to one of these predicaments : 1, to a person ; 2, to tangible or corporeal property (*rei*) ; 3, to incorporeal rights.

The *nature* of the predicament must be examined

into as a *fact* before a *sentence* of what is just can be passed respecting it.

As the fact of relation is ascertained with greater accuracy, as the nature of it is considered with deeper wisdom, the juster will be the sentence pronounced upon it. The more cultivated the mind of the individual, the more accurate will be his judgments as to what is just; the more cultivated the mind of a people, the deeper will be their insight into the true nature of legal (*b*) relations, and the better will be their general definitions of what is just, or, in other words, their laws.

The variety of definitions of what is just, or the variety of laws which prevail in different States, arises in great measure from the different degrees of this culture in different States.

The general opinion of what is just, strengthened by custom and positive enactments, becomes the *jus civile* of a State.

But when many States agree, as all civilized States do, in their opinions of what is just with reference to many legal relations, the *jus civile* becomes to a great extent identical with a *jus gentium* (*c*).

Thus, the Roman Law recognized two classes of *obligations*—those *juris civilis*, and those *juris gentium*,

---

(*b*) Perhaps *jural* would have been a better word. I have been deterred from using it by a dislike to introduce a new word without the sanction of any accredited English authority. (I have in this edition (ed. ii.) adopted the word *jural*.)

(*c*) *Vide infrà*, § dxcvi.

and under the latter head ranked almost all *contracts* (*d*).

These permanent and invariable relations, laid in the necessities and nature of man, may be modified, but cannot be annihilated, by positive law, when the intercourse of the subjects of different States brings these relations at different periods of time within the scope of different jurisdictions. A harmony rather than a conflict of laws is, therefore, to be presumed among civilised States, with respect to the administration of justice upon the most important interests of mankind.

But where the municipal laws of States differ, the ends of justice require that they should agree in the adoption of the law which ought, from the nature and reason of the thing, to govern the *jus* of a foreigner, whether they agree that it shall be the law of his own or of another State.

This practical harmony in the administration of justice ought to be the object of the community of civilized States.

It is a triumph of barbarity when a municipal law is applied to a foreign legal relation or right, instead

---

(*d*) "Ex hoc jure gentium omnes pene contractus introducti sunt, ut emtio, venditio, locatio, conductio . . . . . et alii innumerabiles."—*Inst.* lib. i. t. ii. 2. *Vide infrà*, § dxcvi.

"Sed hæc quidem verborum obligatio Dari spondes? Spondeo, propria civium Romanorum est; *ceteræ vero juris gentium sunt, itaque inter omnes homines, sive cives Romanos sive peregrinos, valent.*"—Gaius, iii. 93.

of the law which, from the nature and reason of the thing, ought to govern it. It is a false and unjust theory, that when States are independent there must be, or ought to be, a conflict of laws, though this may be in certain instances inevitable.

A *jus* once acquired under the dominion of the law of one State ought not to be invalidated by the accident, that the acquirer afterwards brings that *jus*, so to speak, physically, under the dominion of the law of another State. Reason and the interests of society require that its validity should, as a general rule, be equally recognized everywhere :—"Ex quo "liquet," Huber says, "hanc rem non ex simplici "jure civili, sed *ex commodis et tacito populorum con-* "*sensu*, esse petendam : quia sicut leges alterius "populi apud alium directe valere non possunt : ita "commerciis et usui gentium promiscuo nihil foret "magis incommodum, quam si res jure certi loci "validæ, mox alibi diversitate juris infirmaren- "tur" (*e*).

A difficulty does, indeed, sometimes arise from considerations of public policy, which prevent the application of the true abstract rule of law to the *jus* of the private individual. There are cases of exception which it is both morally and legally competent to each State to specify for itself, and which therefore mark the discrimination between Right and

(*e*) *Prælect.* II. lib. i. tit. iii.

Comity ; between Public and Private International Law (*f*).

III. Let me add a word or two as to my predecessors (*g*) in the cultivation of this branch of Jurisprudence.

The first labourers were naturally those jurists who lived in the States composed of different provinces, partly governed by the Roman Law, partly by indigenous customary laws. *D'Argentré*, in treating of the customs of Brittany, and *Burgundus*, in treating of the customs of Flanders, discussed with care and perspicuity portions of the subject, and propounded various general rules by which the selection of the proper law ought to be determined, where the rights of the individual appeared to be under the dominion of two different laws.

Paul and *John Voet* dealt also with the subject, rather inclining to a severe and rigid view of the inadmissibility of exterritorial laws.

(*f*) Cicero, in a very remarkable passage, points out the distinction (which is not to be found in the repositories of the Roman Law) ; he is explaining the *rationale* of *jus* :—

"Juris est omnis ratio nobis explicanda. Quod dividitur in duas partes primas, naturam atque legem. . . . Atque hæc communia sunt naturæ atque legis : sed propria legis et ea quæ scripta sunt, et ea quæ sine litteris, aut *gentium jure*, aut majorum more, retinentur. Scriptorum autem privatum aliud est, publicum aliud : *publicum*, lex, senatusconsultum, fœdus : *privatum*, tabulæ, pactum, conventum, stipulatio. Quæ autem scripta non sunt, ea aut consuetudine aut conventis hominum et quasi consensu obtinentur. *Atque etiam hoc in primis, ut nostros mores legesque tueamur, quodammodo naturali jure præscriptum est.*"—*Partit. Orat.* s. 37.

(*g*) *Vide infrà*, Note to Chap. I. (in which will be found a list of writers on this subject, brought down to the time of the 2nd edition).

Hertius, Chancellor of the University of Giessen, wrote a treatise of considerable repute, *De Collisione Legum.*

Rodenburgh, a distinguished jurist of Utrecht, proceeded much further than his predecessors in the scientific development of Private International Law, investigating, with great care and accuracy of thought, the principles which ought to govern the application of Statutes to the questions of property, to the form and the substance of the acts of men, and to their personal capacity. His disquisition was, however, necessarily limited, being subordinate to the question of rights incident to the *status* of Marriage, the consideration of which question was the object of his work.

Huber, in his "Prælectiones on the Civil Law," pointed out the magnitude of the subject, and gave a valuable but meagre outline of its principles.

Rocco, in 1837, published a treatise on this subject of great merit, under the title of an "Essay on the "Use and Authority of the Laws of the Two Sicilies, "considered in their relation to the persons and "territories of Foreign States."

The variety and extent of the Colonies of Great Britain brought before her tribunals at home and abroad, especially during the present century, cases which rendered it necessary to consider upon what principles they ought to decide, whether the rights of parties ought to be governed by the law of the Colony or the law of England; but no considerable work on

the subject appeared before the elaborate and voluminous commentaries of *Mr. Burge*, a work to which succeeding authors upon Private International Law have been much indebted.

The lawyers of the United States of North America were necessarily led, from the same cause as the lawyers of the old Netherlands and of France before the Revolution—namely, the existence of various States with various laws in one Commonwealth—to the study of this jurisprudence.

The learned essay of *Livermore* led to the elaborate and popular work of *Story*, which has exercised great influence and obtained a very high authority in this kingdom, as well as in the country of its author.

I must, however, be allowed to remark that even *Story* wrote, the nature of his work being considered, too much in the spirit of an English Common Lawyer, and too little in the spirit of an International Jurist.

Of the work of *Fœlix*, *Story* does not appear to have any intimate knowledge; he makes no reference to *Rocco*; and with the essays of *Wächter* and the last of the eight volumes of *Savigny* he was necessarily unacquainted.

While preparing this volume for the press, I was glad to find that this Treatise of *Savigny* had attracted the attention of *Mr. Westlake*, whose recent work on Private International Law has taken its place in the legal literature of England.

Since the Commentaries of *Donellus*, to whom

Savigny was deeply indebted, no more philosophical or profound work has appeared than the great work of *Savigny* on the system of Roman Jurisprudence, in its application to the particular law of his own country, Prussia, and to the general law of the European Continent. His eighth volume contains a separate treatise on Private International Law, conceived in the same spirit and executed with the same ability as the great work of which it is a part. It has been constantly referred to in this work.

I cannot help expressing a hope that the Treatises of such jurists as *Puchta* and *Savigny*, which have the merits without the defects of German erudition, may one day become familiar to English lawyers.

IV. Something let me say, in conclusion, as to the frequent and full reference made throughout this work to the Jurisprudence of ancient Rome, till lately so little known and so often misunderstood in England.

The advantage to the Jurisprudence of Comity which results from this study is twofold: First, a knowledge of the laws, not only of a most civilized people, but of a people which continually imported and incorporated into their administration of justice to foreigners the rules and principles of foreign law, which the reason of the thing and the nature of the relation rendered applicable, when they manifestly rendered inapplicable the strict civil law of the Roman citizen.

In the Institutes, the Digest, and the Code, we are

therefore enabled to study a system of Jurisprudence which avowedly passed over the limits of the positive law of the State in which it sprang up ; a Jurisprudence intended to be applicable to the world.

Secondly, we study in it a *system* of Jurisprudence. Nothing can more advance the culture of Private International Law than the study, not of the letter, but of the spirit, of Roman Jurisprudence, which, because it recognized the duty of applying to *jura* acquired without its limits, or by others than its own citizens, a law founded upon general principles, has become the basis of the law of Christendom.

The law of England and the United States of North America is not properly called by *Story* the Common Law in a Treatise on Private International Law.

If there be any Common Law of States upon this subject, it is, for the reasons already given, furnished by the Roman Law.

Huber justly remarks that, though you may look in vain for rules *eo nomine* on the Conflict of Laws in the repositories of Roman Jurisprudence, yet you will find rules applicable to the subject: "*Regulæ* "*tamen fundamentales*, secundum quas hujus rei (*i.e.* "conflictus legum) judicium regi debet, ex ipso jure "Romano videntur esse petendæ" (*h*).

The sculptor and the painter who are worthy of the name study the works of the ancient masters,

(*h*) *Prælect.* II. lib. i. tit. iii.

not as the object of literal and servile copy, but of reverential and careful inquiry into the principles of truth by which these works have been immortalised.

In like manner, the Jurist ought to study the Roman Law, searching into those principles of truth which, under the guidance of an intimate and practical acquaintance with the nature of legal relations, have rendered it an everlasting monument of the people whose genius brought it forth (*a*).

(*a*) [Note by Editors of third edition. There was no separate preface to the second edition.]

Addenda et Corrigenda.

Page 9, note (*f*), lines 14, 15, for "17 *Martin's Americ.* . . . 675 to 678," read "5 *Martin*, (*Louisiana*) *Rep. New Series*, p. 569, and see especially pp. 590–596. The case is given at length in Appendix I."

Page 45, note (*o*), line 8, for "*Johnson* v. *Sundry Articles of Merchandise*," read "*United States* v. *The Penelope*, 2 *Adm. Decis.* p. 438, cited in *Johnson* v. *Sundry Articles of Merchandise*." Line 10, for "171" read "173."

Page 96, note (*f*), line 2, after "pp. 113, 114" add "[It is reported in *Paton's Scotch Appeals in the House of Lords*, vol. i. p. 454, under the name of *Baynes* v. *Earl of Sutherland*. See the note by Lord Elchies.]"

Page 267, note (*o*), line 2, add "Given at length in Appendix I."

notes (*o*), (*p*), (*q*), for "(*Amer.*)" read "(*Louisiana*)."

Pages 279, 283, at the end of note (*qq*) add "[Four new states, Washington, Montana, North Dakota, South Dakota, have been added to the thirty-eight above mentioned.

"An Act of Congress has been passed, and has been pronounced by the Supreme Court not to be unconstitutional, which prohibits Chinese labourers from entering any part of the Union.]"

Page 305, line 12, add "[Appendix II. also contains a note on Belgian marriage law.]"

Page 718, notes (*o*) and (*f*), at the end of the notes, add "[This Act has been repealed, and its provisions in substance re-enacted by 52 Vict. c. 10.]"

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COMMENTARIES

UPON

INTERNATIONAL LAW.

CHAPTER I.

JUS GENTIUM—PRIVATE INTERNATIONAL LAW.

I. *JUS INTER GENTES*, or, as it is sometimes called, Public International Law, has been the subject of the three preceding volumes. It remains to consider in this, the last volume of the whole treatise (*a*), *Jus Gentium*, or, as it is sometimes called, Private International Law, or Comity (*b*) (*Comitas*)(*c*).

(*a*) In redemption of the pledge given, vol. i. § xvi.

(*b*) "Denique nonnunquam dum populus vicinus vicini mores *comiter* vult observare, et ne multa bene gesta turbarentur, de moribus statuta territorium statuentis, inspecto effectu, solent egredi."—*P. Voet, De Statutis eorumque Concursu*, s. iv. cap. ii. 17.

John Voet, speaking of the rule that moveables are governed "lege loci, in quo eorum dominus domicilium fovet, ubicunque illa verè extiterint," observes, that in this case "de juris rigore communi, quasi gentium omnium consensu laxatum est; sic ut *ex comitate* profecta regula praxi universali invaluerit."—*Ad Pandect.* lib. i. tit. iv. pars ii. num. 12.

So *Huberus, De Conflictu Legum*, s. 2, "id *comiter* agunt," &c.

The word occurs once in the *Digest*: "Liber autem populus est is," &c., "sive fœdere comprehensum est ut is populus alterius populi majestatem *comiter* conservaret."—Lib. xlix. t. xv. 7, § 1.

"*Une espèce* de droit des gens et de bienséance."—*Bouhier*, cited by *Fœlix*, s. 11, p. 24, ed. *Demangeat*.

"La compiacenza vicendevole."—*Rocco*, p. 119.

"Mutua compiacenza."—*Rocco*, pp. 120, 253.

(*c*) See a notice at the end of this chapter, of the Sources of Private International Law.

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II. We have seen, in the first of the foregoing volumes, that Sovereignty united with Domain (*dominium eminens*) establishes, as a fundamental rule of International Law, the exclusive jurisdiction of a State over all persons, acts, and things, within its territories (*d*); and, of course, over suits and actions in Courts of Justice, civil or criminal, arising within these limits.

This is a proposition which does not only concern the natives of a territory, who are naturally subject to such a jurisdiction. There is no country, not only in Europe, but in the world, since the opening of China and Japan, in which there may not be foreigners, both transient and resident (*e*). Being allowed to enter a State, of which they are not natives, they have a strict right to be secured from injury while therein; the ill-usage of them, whether by positive mal-treatment (*f*) or by a denial of

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(*d*) The exception of the ambassador, which is a matter *stricti juris inter gentes*, and not *comitatis juris gentium*, is mentioned, vol. ii. pt. vi. *Puchta, Instit.* i. 360.

(*e*) "Civil laws, when they causelessly and unreasonably exclude foreigners either from coming into the territories at all, or from trading there, are inhospitable; but these inhospitable civil laws are no otherwise contrary to the laws of nations, than as this law, like the general law of nature, enjoins the duties of humanity and benevolence. Every nation has by the law of nations, as every individual has by the law of nature, a right to judge for itself how far its intercourse, either of the commercial or of the friendly sort, is likely to be detrimental to itself; so that to cut off either or both sorts of intercourse, will be no act of injustice, though it will be wrong if it is done causelessly. A nation has a moral power to withhold its benevolence; and they from whom it is withheld unreasonably, though they are not treated friendly, are not injured."—*Rutherford's Inst. of Natural Law* (2nd edit. 1832), p. 489.

(*f*) The *Jus Albinatus*, or *Albinagii* (*alibi natus*), or *droit d'Aubaine*, now happily abolished in all civilized states, whereby the Crown seized on the property of the deceased foreigners, was, perhaps, strictly speaking, a violation only of Comity; but it was on the confines of a legal as well as a moral injustice. Some relic of this barbarism appears still to linger in parts of Germany, in which it would seem that the foreign heir pays 10 per cent. of his inheritance to the State. —*Blume, S., des Deutsches P. Rechts*, s. 452. This is called *Gabella*

justice (*g*), may be, and ought to be, resented by the State of which they are members. A refusal of redress in such cases would be a justifiable cause of war. If by long usage and custom they have been allowed to enjoy certain rights; and these, though originally the fruit of free concession, are violently, suddenly, and without equitable notice, withdrawn from them; an injury is done to them, for which it is the duty of their own State to obtain reparation (*h*), the denial of which justifies a recourse to *reprisals* (*i*), or *war* (*j*), according to the exigencies of the case. But here the narrow province of International Right ends, and the wide domain of International Comity begins. For though the laws of every State are built partly upon general principles common to all States, *jus gentium*, they are also partly built upon positive enact-

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Hereditaria. —*Martens*, liv. iii. c. iii. s. 90; *Vattel*, liv. ii. c. viii. ss. 112–114; *Merlin*, *Rép. de Jur.*, Aubain; *Rocco*, p. 63, speaks of it in a manner worthy of the great school of Neapolitan jurists: "l'albinato, questa usanza derivata dalla barbarie delle nazioni," &c., was, he says, in force at Naples.

Pütter, *Das praktische Europäische Fremdenrecht* (Leipzig, 1845), Erster Abschnitt, 13. This is, generally speaking, a good little work; though the present English Law is incorrectly stated with respect to the operation of Domicil upon the wills of English subjects, p. 23.

Rocco speaks of domiciled foreigners as having the same *private* rights as natives of the Two Sicilies: "Oggidì avvenga che quasi tutte le leggi della colta Europa ammettano i forestieri ad esercitare i diritti civili, gli respingono poi allora che si tratta di partecipare alle cariche dello Stato" (p. 39); but of *non-domiciled* strangers as enjoying only those rights which their country accords to the natives of the Two Sicilies, "sol quando s' intrametta la *reciprocazione* fra i due Stati" (p. 40). Here he is speaking of "Esteri non-domiciliati," or, as he afterwards calls them, "semplicemente residenti" (p. 59).

(*g*) France, however, has thought it consistent with Comity to refuse, as a general rule, to entertain suits between two foreigners in her courts of justice.—*Vide post*, §§ dcccxcii. dcccxciii.

(*h*) In the case of rights secured by treaty and withdrawn in time of peace, the *casus belli* is, of course, beyond the reach of doubt, vol. iii. § xxxv.

(*i*) *Vide antè*, vol. iii. ch. 2.

(*j*) *Vide antè*, vol. iii. § xxxv.

ments, *jus civile*; and, though there is, moreover, a *speciale jus inter gentes* (*k*) common to all Christian States, the practical application of those general principles and of this *jus speciale* may vary in different States. There is no universal positive law for all mankind. Each State has its own municipal code; though each code contains many principles common to all: and each individual is a member of the great family of mankind.

III. States becoming, under the blessed influence of Christianity and its attendant civilization, more and more impressed with a deeper sense of national duty, and with the principles of universal justice, having regard also to their reciprocal advantages and mutual interests (*mutuæ vicissitudinis obtentu—ob reciprocam utilitatem*) arising from the impartial administration of justice to the foreigner and the native (*l*), have tacitly agreed (*m*) to recognize and adopt certain common rules and maxims of jurisprudence, both civil and criminal, with respect to the individual foreigners sojourning within their territory, and with respect to the operation therein of the laws of a foreign State. "Usu exigente" (to borrow the language of the *Institutes*) "et humanis necessitatibus gentes "humanæ jura quædam sibi constituerunt" (*n*).

(*k*) *Vide antè*, vol. i. pt. i. c. i.

(*l*) "Le genti colte prestano mutuamente osservanza agli atti celebrati, e alle obligazioni e a' diritti nati nelle stranie contrade. E le qualità personali legittimamente infisse nel luogo del domicilio si mantengono mai sempre intere col mutar che si fa della residenza e passaggiera dimora. Quantunque il diritto delle genti che *necessario* dai giuspubblicisti si appella non ordini questa *vicendevole applicazione* e autorità delle leggi di uno stato sul territorio dell' altro. Nissuna primitiva obbligazione stringe le nazioni a riconoscere provvedimenti stranieri. Nullameno *il diritto delle genti volontario*, il quale intende alla perfezione progressiva dei popoli, altamente il richiede."—*Rocco*, p. 111.

(*m*) See in *Wheaton's Hist.* 726-8, Mr. Webster's Letter, in which the difference between Comity and strict Right is much dwelt upon.—See 18 *Curteis's* (*Americ.*) *Rep.* 203.

(*n*) Lib. i. t. ii. 2.

IV. This consent has manifested itself in various ways; in the decisions of Courts of Law, in writings of accredited jurists, in acts of the executive authority (*o*), such as the declaration with respect to the security of foreign merchants, on the breaking out of war, contained in the Magna Charta of England (*p*). More recently also, France, as will presently be seen, and some other nations, have incorporated into their national code express provisions relating to this subject.

But France had suffered before her first revolution—and the same may be predicated of England, and the United States of North America—a system of *Private International Law* (*Jus Gentium*) to grow up, partly out of the analogies furnished by the Roman (*q*) Civil Law (*r*), partly out of

(*o*) *Story*, s. 38, n. 1.

(*p*) *Vide* vol. iii. § lxxviii.

(*q*) *Story* unfortunately, in my opinion, in a treatise on *International Law*, uses the words, "common law," meaning the English and North American Law; but the Roman Law is the "common law" of States.

(*r*) See vol. i. p. xlvii, Preface to first edition of this work.

Early in the history of ancient Italy the intercourse between *Romans* and those who were *not Romans* created, of necessity, what was in substance an *International Private Law* or *Comity*, to which the name *jus gentium* ("quod apud omnes gentes peræque custoditur, juris gentium est") properly belonged, as distinguished from the *jus inter gentes*. The history of its growth from its introduction through the *annual* and *perpetual edicts* of the Prætor to its full development in the compilations of *Justinian*, in which it appears as the law of the Empire, is a most interesting subject, but far beyond the limits of any note. These compilations were naturally the principal storehouse from which the rules of modern Comity were taken; though, unfortunately, an ignorance of the history of the Roman Law, and a superficial acquaintance with its whole system, led especially, but by no means solely, in England, to many mistakes in the application of the rules of this jurisprudence: *vide post*, remarks on the misapplication of the maxims of law as to *nudum pactum* in our municipal law, and in Private International Law of *mobilia sequuntur personam—locus regit actum*, &c. See some good remarks on the Roman *Jus Gentium*, *Mommsen*, *Römische Geschichte*, i. 146; iii. 540; on the misapplication, *Wächter*, *Die Collision der Privatrechtsgesetze verschiedener Staaten* (in *Archiv für die civilistische Praxis*, vol. xxiv. p. 242). That there are, however, rules on the subject

an enlightened application of the principles of their own municipal jurisprudence, and of that of other countries, partly out of the general usages of commerce (*s*), aided by the reasoning of writers of all nations upon Public Law.

V. Upon the application of principles derived from these sources to the decisions of particular questions, the fabric of International Comity has been slowly but steadily reared; it is daily acquiring consistency and strength, and has already become a *Jus Gentium Privatum*, having for its object the decision of questions affecting the interest of individuals, as the *Jus Gentium Publicum*, or, more properly, *Jus inter Gentes* (*t*), has for its object the decision of questions growing out of the mutual relations of communities.

VI. In illustration of the position in the last paragraph, it may be observed that some modern codes of European States contain express provisions upon the subject of the general Civil *Status* of the foreigner within their territory. The French, the Austrian, and the Prussian codes all contain some enactments on this subject. The French code recognises distinctly an equality between the native subject and the foreigner, as to the enjoyment and capacity of

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of collision of laws to be found in the Roman Law, though defective and incomplete, see *Savigny*, viii. s. 344. *Justinian* introduced a real *jus gentium* by removing the distinction between *cives* and *peregrini* who belonged to the empire. (*Cod.* lib. vii. tt. v.-vi.)

(*s*) The *Law Merchant* is both a part of Private International Law and of the Common Law of England. This advantage is mainly due to the Roman Law and its commentators. It will be the subject of a separate and distinct consideration in a later part of this volume.

Comity was wholly alien to the Feudal Law. See *Barante, Ducs de Bourgogne*, Introd.

(*t*) *Donellus* explains *jus publicum* as follows:—"Dicuntur res ad statum Reipublicæ pertinere, sine quibus aut civitas constitui, aut constituta stare incolumis non potest; id enim *statum* cujusque rei vocamus, quo res stat et sine quo non consisteret. Itaque si cognoverimus, quænam eæ res sunt et quid de his juris sit, simul *jus publicum* tenebimus."—*Donelli De Jure Civ. Comment.* lib. iii. ch. v.

acquiring civil rights (*u*). But on the subject of collision between native and foreign laws, it contains few special provisions, though some will be referred to hereafter in the discussion of foreign *Contracts* and *Testaments*.

The Prussian code contains an express acknowledgment of the principle that the foreigner has a right to the same administration of justice as the native (*x*). Where an exception is made, it is with the intent of relieving the foreigner from the effect of the collision of local laws and usages to which the native is exposed. Savigny remarks that the doctrine dominant at the time of the compilation of this code of *Personal and Real Statutes* had a marked influence on the terms of these texts of the law, and has led to important difficulties in their application, especially in the matter of *Succession* (*y*).

The Austrian code resembles the Prussian in this matter, and contains similar provisions with respect to foreigners (*z*). There are codes of other nations (*a*), European and American, containing positive enactments relating to the validity and interpretation of *Contracts* and *Testaments* and *Successions* of Foreigners (*b*).

VII. Private International Law has been generally discussed in treatises bearing the title of "Commentaries upon the Collision or Conflict of Laws," a mode of treating the subject which is certainly not philosophical. According to Savigny, The natural order of thinking upon the subject is—to ask, as to the rule of law to be applied, the

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(*u*) *Code Civil*, Art. 3, 11, 13. *Massé, Le Droit Comm.* liv. ii. t. ii. ch. i. (ed. 1874). [So in Italy (*Codice Civile d'Italia*, art. 3), "Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini."]

(*x*) *Allgem. Landrecht*, Einleitung, ss. 22–27, 34, 35, 40–42.

(*y*) *System des R. R.* viii. s. 361.

(*z*) *Oester. Gesetzbuch*, s. 4, ss. 33–37.

(*a*) *Vide post.*

(*b*) *Fœlix, Traité du Droit International Privé*, liv. ii. tit. i. s. 7, (tome i. p. 243). See too the Brazilian Code (1857), Consolidação das Leis Civis, s. 5 (proof of birth, &c.), 34, 1260; 1266 (successions); s. 408 (*status* and age); s. 696 (contracts).

question What is the jural relation (*c*) which it is to govern? As to the jural relation, To what rule of law is it subject, or does it belong? The enquiry concerning the limits of territorial sovereignty or dependence, and concerning the difficulties and disputes arising from the demarcations of these limits, or from collisions, is in its nature a secondary and subordinate enquiry. Wächter (*d*), he adds, makes the just remark, that many writers who entirely separate the question as to the application of the law from the question as to the Collision, have been thereby led into the error of giving upon two identical questions contradictory answers (*e*).

VIII. The very interesting but very difficult question, What are the limits assigned by the *Jus Gentium Privatum* to the operation of the laws of one State within the territory of another? necessarily involves a twofold consideration of the conflict of laws:—1. With respect to the different positive laws of different States; 2. With respect to the diversity of the practice of States, as to recognising the authority of each other's laws, and giving effect to them beyond their proper sphere. The expression itself —*Jus Gentium*, or *Jus Gentium Privatum*—however convenient, and, though open, perhaps, to less objection than any other expression, is yet not strictly accurate; and the use of it must not lead us to forget that clear and important distinction between the concessions of Comity and the obligations of Right, which flow from the cardinal principles of International Law, viz. the Equality and Independence of States: "Debitor," says the Roman Law, "intelligitur is, a quo invito exigi pecunia potest" (*f*).

(*c*) So I have rendered the German word used by *Savigny* in this passage and familiar to the readers of *Puchta* and *Blume*, viz. *Rechtsverhältniss*.

(*d*) *Wächter*, ii. 34.

(*e*) *Savigny*, *R. R.* viii. s. 344.

(*f*) *Dig.* lib. l. t. xvi. 108.

The two propositions—viz. that the laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate*; and that the

One State may be lawfully compelled by force to pay its debt to another member of the community of States. But the favour or grace of Comity may not lawfully be exacted by force. And from the same authority is derived the maxim so often cited on the subject, "Extra territorium "jus dicenti impunè non paretur" (*g*).

IX. The writer upon International Law is bound to draw the distinction which has been mentioned between Comity and Law. But having done so, and shown on what terms Comity is admitted to govern the legal relations of the subjects of different States, he may and ought to insist that the *jus gentium*, like the *jus inter gentes*, is built upon the hypothesis of a common law for a Commonwealth of States (*h*)—"Sub diversitate judicum, una justitia" (*i*). And as the National Jurist endeavours to apply rules of

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judicial power will exercise a discretion with respect to the laws they may be called upon to sanction, and, if they be manifestly unjust, or calculated to injure the citizens of the State in which that power is exercised, refuse to sanction them—appear to have been very strongly asserted by the Courts of the United States of North America in the following cases :—

Blanbord v. *Russell*, 13 *Massachusetts Rep.* pp. 1–6.
Prentiss v. *Savage*, *ib.* pp. 20–24.
Tappan v. *Poor*, 15 *ib.* pp. 419–422.
Ingraham v. *Geyer*, 13 *ib.* pp. 146–7.
Cambridge v. *Lexington*, 1 *Pickering's Rep.* p. 506.

These cases are cited in *Curtis's United States Digest*, vol. ii. p. 762, n. 46.

See also a leading case, *Saul* v. *His Creditors*, 17 *Martins' Americ. Rep.* pp. 569, 590 to 596 ; s. c. 8 *Louisiana Rep.* pp. 665, 675 to 678. [See Lord Selborne's judgment in *Ewing* v. *Orr Ewing*, *L. R.* 10 App. Ca. A.D. 1885 at p. 513.]

(*g*) *Dig.* lib. ii. t. i. 20. A maxim relating to the limits of different domestic jurisdictions borrowed from the *municipal* law of the Romans, and applied, like others, on account of its intrinsic worth, by States to each other. See remarks, vol. i. pt i. ch. iv.

(*h*) *Savigny*, *R. R.* viii. ss. 348, 349. He remarks, justly, that this theory of a community of States, and the constant tendency to adopt a uniform practice upon the subject of Foreign Law, were unknown to the Romans, and are due to the rapid intercourse among the subjects of different States in modern times.

(*i*) *Cassiodorus*, as cited by *Miltitz*, *Manuel des Consuls*, i. 162.

justice to cases which come in contact with different laws of different independent portions or provinces of one integral State, so ought the International Jurist to consider cases which come in contact with the laws of different States of one Commonwealth, and to apply the like rules of justice. To both the remark of Pascal is equally applicable, "Plaisante justice qu'une rivière ou une montagne borne" (*j*); or, as it is admirably put by Cicero, "Qui autem civium rationem dicunt esse habendam, externorum negant, hi dirimunt humani generis societatem" (*k*). It is true that the National Jurist may, with respect to different portions of one State, invoke the sanction and enforcement of a common superior; while the International Jurist cannot do this, for States have no common superior; but he finds a practical substitute in the pressure of the necessities, and mutuality of the exigencies, of States. Every invention of man (and the age teems with such devices), which renders more easy and more quick the intercourse of the subjects of different States, increases this pressure, and strengthens this mutuality. To treat the foreigner and the native as entitled to a like measure of justice has become the manifest interest, as it has ever been the clear duty, of States. The vision of the great statesman and orator does not appear incapable of practical fulfilment to the Christian Jurist, who sees how marvellously time and space are, relatively to the past, annihilated, and how the remotest corners of the earth are becoming knit together by agencies unknown, undreamt of, by antiquity. The day may not be far off when civilized man, wherever he goes, "sese "non unius circumdatum mœnibus loci, sed civem totius "mundi, quasi unius urbis agnoverit" (*l*).

X. In England, the subjects (*m*) of the other States of

(*j*) *Pensées*, art. vi. s. 8.
(*k*) *De Off.* lib. iii. c. xi.
(*l*) *Cicero, De Legibus*, p. i. c. xx. 166.
(*m*) "And as the judges furthermore may informe the Lords, howe

Christendom have been, speaking generally, governed, in such cases as are mentioned in the last section, on the same principles of law as her own subjects of Scotland and of her Colonies. "The *jus gentium*" (said an eminent English civilian and judge in the last century) "is the law "of every country" (*n*).

The same may be predicated of other States, especially of Prussia, but not, as will be seen, without great deductions, of France (*o*).

XI. And it may be observed that this branch of jurisprudence has been, and is being, more scientifically developed than others, by judges and by jurists. It is a matter for rejoicing that it has escaped the Procrustean treatment of positive legislation, and has been allowed to grow to its fair proportions under the influence of that science which works out of conscience, reason, and experience the great problem of Law, or Civil Justice. The judge who has to decide by what Law a particular Jural Relation, which comes into contact with the laws of divers States, shall be governed, ought to apply to this contested Jural Relation that local positive law to which it is, in its true nature, properly subject or appertaining, without

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former lawes of this realme presentlie stand touchinge any matter there debated. For many they bee also informed by the Masters of the Chancery (of which the greatest number have alwaies been chosen men skillfull in the Civil and Canon Lawes) in lawes that they shall make touching forraine matters, whom the same shall accord with *Equitie*, *Jus Gentium*, and the Lawes of other nations."—*A Treatise of the Masters of the Chancerie*, date between 1596 and 1603 (*Hargrave's Law Tracts*, p. 309).

(*n*) *Scrimshire* v. *Scrimshire*, 2 *Haggard's Consistory Rep.* p. 417. *Ruding* v. *Smith*, *ib.* p. 384–6.

So *Lord Stowell* (in a prize case, it is true, but referring to the *Jus Gentium*, and not the *Jus inter Gentes*): "This is the law not of the Court only, but of all Courts, and one of the first principles of *universal jurisprudence*."—*The Betsy*, 1 *C. Rob. Adm. Rep.* p. 94. So he speaks of "*The general rule of civilised nations*" as to derelict.—*The Aquila*, *ib.* p. 42. "Salvage is a question of the *jus gentium*."—*Ib.* p. 279.

(*o*) See *Fœlix*. Préface de la seconde édition, p. vii.

distinguishing whether that law be the law of his own or of a Foreign State.

The State ought to permit its judge to treat the Foreign Law as one of the sources from which, in the particular case before him, he is to derive justice. It ought, as Lord Stowell observes, to make it a principle of its own law to adopt the law of the foreigner (*p*).

XII. Nevertheless, there are exceptional restrictions which limit, in a Commonwealth of States, the application of this principle of a Common Law; they grow out of the reason and nature of the thing. In every State there are various kinds of laws, the special nature of which is not in harmony with this principle.

To define the limits of these exceptional restrictions is among the most difficult tasks which can be imposed upon the jurist.

XIII. These exceptional restrictions partake of (*q*) a political and (*r*) of a moral and religious character: for International Comity, like International Law, can only exist in its lowest degree among Independent States; in its next degree among Independent Civilized States, and in its highest degree among Independent Christian States (*r*). There is a third class of these exceptional restrictions, namely, laws of a stringent, positive character, which are the peculiar growth of the peculiar institutions of a Foreign State,—an exotic incapable from its nature of being transplanted into a strange soil. Under these three categories it would seem that all these exceptional restrictions may be classed.

XIV. First, with respect to those of a political character.

(*p*) *Dalrymple* v. *Dalrymple*, 2 *Haggard's Consistory Reports*, p. 39; *et vide post.*

(*q*) *Savigny*, *R. R.* viii. ss. 349–365.

Story, s. 28.

Foelix, tit. prélim. chap. iii. (tome i. p. 28).

(*r*) *Vide antè*, vol. i. pt. i. ch. i.

The law of the Foreign State cannot be admitted into another State if it be contrary to any fundamental or constitutional law or usage of that State.

Under this head are included the following propositions:—

1. That the Foreign Law be not incompatible with the safety of the State.

2. That it be not prejudicial to the public interest of the State.

Under this head also may be mentioned the universal rule that one State will not administer within its territory the Criminal Law of another: How far the generality of this proposition may have been qualified by Treaties on the subject of Extradition, and the practice of States thereupon, has been considered in a former volume of this work (*s*).

XV. Secondly—With respect to Exceptional Restrictions arising from Moral and Religious considerations, no Foreign Law which enjoins or sanctions an institution, custom or practice, at variance with the immutable Laws of Right written by the finger of God on the heart of man (*t*), or with those which have been the subject of His express Revelation, can be admitted into a Christian State (*u*).

XVI. With respect to the Exceptional Restriction arising from considerations of the stringent positive character of the Foreign Law, a law of this character, the peculiar growth of accidental circumstances, alien to the feelings, habits, and Laws of the State which would have to enforce it, has no claim to be admitted, on the ground of Comity, concerning which, in such a case as this, the

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(*s*) Vol. i. pt. iii. ch. xxi.

(*t*) "Pacta quæ contra leges constitutionesque vel contra bonos mores fiunt nullam vim habere indubitati juris est."—*Cod.* lib. ii. t. iii. 6.

"Pacta quæ turpem causam continent non sunt observanda."—*Dig.* lib. ii. t. xiv. 27, § 4.

(*u*) *Vide antè*, vol i. pt. i. ch. iii.

rule of Huberus is sound—"Quatenus sine præjudicio in-" dulgentium fieri potest" (*x*).

XVII. A case may also be imagined not only where there is a conflict between the laws of the Foreign State and the State of the *forum*, but also, where it is a matter of doubt which should prevail. In such a case, the tribunals of North American United States (*y*) have declared themselves strongly in favour of the law of the actual *forum*. Probably such a case would be of very rare occurrence, but the principle of such a decision appears to the writer of these pages very questionable (*z*).

XVIII. The foregoing categories appear to comprise the principles which regulate the application, and restrain the enforcement of Foreign Laws, according to the Comity of States; whether that Comity be administered in Courts of Justice, or by acts of the Executive or of the Administrative authorities (*a*). Many illustrations of the possible application in practice of the restrictions may be imagined.

For instance,—no Christian nation (*b*) could be ex-

(*x*) *De Conflictu Leg.* lib. i. tit. ii. s. 2.

Story, speaking of Assignments by Bankruptcy Laws, says, "Besides, National Comity requires us to give effect to such assignments only as far as may be done without impairing the remedies or lessening the securities which our Laws have provided for our own citizens," s. 414. He relies on the doctrine of *Huberus.—Vide post*, as to Bankruptcy and its effects in Foreign States.

(*y*) *Story*, s. 28; see *Saul* v. *His Creditors*, *vide ante*, § viii. n. (f).

(*z*) The mischievous extent to which this doctrine may be easily pushed appears in the decision of the Louisiana tribunal in *Olivier* v. *Townes*, 2 *Martins'* (*Americ.*) *N. S. Reports*, p. 93; s.c. 7 *Martins*, p. 50.

(*a*) *Fenton* v. *Livingstone*, 3 *Macq. H. L. C.* p. 497.

(*b*) But a Christian State may possess a Heathen dependency, which it allows to continue under its own laws, and then, if the last Court of Appeal be in the Christian mother State, it must recognize the Heathen Law, even in the case of marriage. See, as partly illustrating this point, a decision of the Privy Council.—*Ardassar Cursetjee* v. *Perozeboye*, 10 *Moore's P. C. Rep.* 374. So it may allow an unchristian race, like the Jews, to live according to their own laws in the Christian territory. But these are questions rather of Public than International Law.

pected to tolerate Polygamy, or Incest, within its territory, because the persons practising it were subjects of a country which permitted such connections. Nor could a Christian nation, whose law regarded certain marriages as incestuous which other Christian nations sanctioned, be required to recognise the validity of such marriages in the cases of its own subjects, though celebrated in a country which permitted them. And it has been ruled in an English Court, that when a Court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of the latter; for if any part of the contract is inconsistent with the law and policy of the former, the contract will not be enforced even as to another part of it which may not be open to this objection, and which may be the only part remaining to be performed (*c*).

No country which held the *status* of slavery to be abominable, and unwarranted by the laws of God and man (as most Christian nations do at this moment), would allow any title to property of this description to be set up, or any legal consequences to be drawn from it within her dominions.

XIX. In the case of the *Creole* (*d*), which formed the subject of a dispute between Great Britain and the United States of America in 1842, this doctrine was steadily maintained by the former power. That vessel, having been driven by stress of weather into the Bahamas, a British port, certain slaves on board her, who were being conveyed from one port of America to another, where the curse of slavery then existed, rose upon their master, overpowered him, and effected their escape. The British authorities refused to allow any force to be used towards these persons to compel them to return to slavery;—the

(*c*) *Hope* v. *Hope*, 8 *De G., M. & G.* p. 731; 3 *Jur. N. S.* p. 454; 26 *L. J. Ch.* p. 417.

(*d*) See the case of the *Creole* considered by R. Phillimore, in a letter to Lord Ashburton, published in 1842.

Comity of Nations, through which alone such force could have been exercised, did not require her to sacrifice a fundamental principle of her laws—namely, the inviolable right of personal liberty of all persons within her realms—in order to enforce therein the ordinances of another country.

Long before this period, and while Great Britain was still largely participating in the accursed traffic—from the guilt of which she had endeavoured, before the time of the last-mentioned occurrence, by every means in her power, to purge herself—in the year 1771, the decision of Lord Mansfield, in the famous case of Somerset, the Negro, had shown that she applied this vital maxim of her Constitutional Law, under circumstances of far greater embarrassment, rigorously against the interests of her own subjects. France appears to have held steadily the same doctrine (*e*).

XX. Again, no State can be expected to enforce the execution of any law which offends the religious feeling of the community—such, for instance, as the law that the descendants of a Jew, who had been converted to Christianity, should be excluded from the right of succession *ab intestato*, or such as the old Irish Popery Laws, branded with deserved infamy in the immortal writings of Burke (*f*).

XXI. No State would allow a foreigner to do any act with respect to another foreigner of the same nation, which

(*e*) *Demangeat, Du Statut Personnel, Revue Pratique de Droit Français*, t. i. p. 57.

(*f*) *Vide antè*, vol. ii. App. ii. "Unfortunately (*Story* observes), from a very questionable subserviency to mere commercial gains, it has become an established formulary of the Common" (he means the English and American) "Law, that no nation will regard or enforce the Revenue Laws of any other country; and that the contracts of its own subjects made to evade or defraud the laws or just rights of foreign nations may be enforced in its own tribunals. Sound morals would seem to point to a very different conclusion. Pothier has . . . . reprobated the doctrine in strong terms."—*Conflict of Laws*, s. 245.

act would violate the law of the State, though permitted by the law of their own land. No foreigner, for instance, would be allowed to inflict any chastisement or cruelty upon his wife, or any member of his family or suite, because such chastisement or cruelty would be authorised by the law of the foreigner's native country.

XXII. The foregoing cases relate principally to the question of allowing the operation of Foreign Laws at variance with the religion or morality of the State. There are others in which the application of these laws is denied, because injurious to the public policy of the nation (*g*).

XXIII. Thus Great Britain and the United States of North America, till recently, considered the allegiance of native subjects as indelible; and though they allowed them to be domiciled in another country, and would consider them as subjects of that country in many respects, *e.g.* with regard to their succession to personal property, to their contracts and other matters, they would not allow them so to incorporate themselves with another nation, as to become at liberty, in the event of war breaking out between the country of their domicil and that of their birth, to bear arms against the latter (*h*). Prisoners of this description were considered as rebels, and not as lawful enemies.

XXIV. If a State, upon grounds which are supposed to concern the welfare and safety of the Constitution, impress a personal incapacity upon its Sovereign or its subject (*i*) to enter into a contract of a particular description, that State will not hold valid such a contract because it was executed in a foreign land, according to the Municipal Law of which it was legal and binding. England, by the Royal Marriage Act, impressed a personal incapacity upon

(*g*) As to champerty (*Grell* v. *Levy*, 10 *C. B. N. S.* p. 73), *vide post*, § dcxxvi. note.

(*h*) *Vide antè*, vol. i. § cccxxxi.

(*i*) *Vide post*, § cccxcvi. note.

certain members of the Royal Family to contract a marriage except under certain conditions; and the tribunals of this country refused to recognise a marriage duly and legally contracted, according to the *lex loci contractûs*, by a member of that family, in a foreign land, but with respect to which these conditions had not been fulfilled: England has also, by the express provisions of a statute (*k*), rendered it unlawful for any of her subjects, "wheresoever "residing," to be the possessor or purchaser of a slave even in any State. Upon this subject also an indelible personal incapacity is by this law impressed upon the Englishman, and though the penalty of infringing it cannot be inflicted upon him while he is resident in a State which permits slavery, it will reach him whenever he comes within the jurisdiction of England.

XXV. But where these Exceptional Restrictions do not apply, a State can then (to borrow the phrase of Vattel) perform an office for another nation without neglecting its duty towards itself: or rather Comity then assumes the character of a *Jus Gentium Privatum*; the general principle of which cannot be more happily conveyed than in the language (*l*) of Lord Stowell's celebrated judgment in *Dalrymple* v. *Dalrymple*, where, deciding in an English Court upon the validity of a Scotch marriage, he said, "Being entertained in an English Court, it must be ad-"judicated according to the principle of English law "applicable to such a case. But the only principle

(*k*) 6 & 7 Vic. c. 98, s. 1.

(*l*) 2 *Haggard's Consist. Rep.* p. 58. See also *Townsend* v. *Jamison*, 9 *Howard's Amer. Rep.* p. 407; 18 *Curtis's Amer. Rep.* p. 202. The following passages, from this judgment of the Supreme Court of the United States of North America, are worthy of all consideration:—

"It has become, as we have always said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment,—when there is no positive rule affirming, denying, or restraining the operation of Foreign Laws, courts establish a Comity for such as are not repugnant to the policy or in conflict with the laws of the State from which they derive their organization."

" applicable to such a case by the law of England is, that " the validity of the marriage rights must be tried by " reference to the law of the country where, if they exist " at all, they had their origin.

" Having furnished this principle, the law of England " withdraws altogether, and leaves the legal question to " the exclusive judgment of the law of Scotland."

The principal sources of Private International Law are the following :—

I. Writers on General or Public International Law—they have rarely or very incidentally touched upon Comity or Private International Law :—

Grotius, pp. 416–593, 595, 675–697.

Pufendorf, De Jure N. et G. lib. ii. c. iii. p. 150, fol. ed.

Bynkershoek, De Foro Legatorum, c. ii.

Günther, Europäisches Völkerrecht, pp. 30, 31.

Zouch, De Jure Feciali sive de judicio inter gentes, iii.

Vattel, liv. ii. c. viii.

Martens, Dr. des Gens, liv. iii. c. iii. ss. 93, 98, 99, 100.

Heffter, s. 35.

II. Civilians or commentators on the Roman Law—they have occasionally dealt with this question :—

Bartolus, in Codicem, lib. i. c. *De Summâ Trinitate*, n. 13–51. This is the fountain of Private International Jurisprudence. Without a careful study of this Commentary, nobody can be thoroughly versed in the history of the progress of the principles of Private International Law. Who would have expected such a treatise in a *Gloss* on the words " cunctos populos " in a chapter *De Summâ Trinitate* ?

J. Voet, in his *Commentary on the Pandects*, lib. i. t. iv. *De Constitut. Princ.*, at part ii. *De Statutis*, ss. 1–22.

Huberus, Prælect. ad Pandectas, treats *De Conflictu Legum* in an *Appendix* to lib. i. t. iii. *De Legibus*, ss. 1–15.

Mühlenbruch, Doctrina Pandectarum, lib. i. c. iv. De ratione quæ inter plures leges vel concurrentes vel secum dissidentes intercedit, pp. 148–159 (A.D. 1830).

Puchta, Instit. I. 360, explains *Jus Gentium*.

Savigny, System des R. Rechts, I. s. 22 (112–119), explains *Jus Gentium*, showing how it affected the *jus civile*. Here *Jus Gentium* is in fact Comity.

III. Writers on Municipal Law treating incidentally of Private International Law :—

B. D'Argentré, Comment. ad patrias Britonum leges. The 218th Article of the Customs of Bretagne ordains that no one shall leave away from his natural heirs more than *one-third* of his immoveable property. Thereupon arose the question whether immoveables situated out of Bretagne ought to be included in this *third*. D'Argentré, in the sixth Gloss upon the 218th Article, enters fully into the question of the collision of laws, pp. 601–620. The work was published after his death, A.D. 1608.

C. Rodenburg, De Jure Conjugum. The question of the Collision of Laws is treated of at length in his *Præliminaria*, pp. 13–178 (A.D. 1653).

D'Aguesseau, xiii. 639, *Mémoire sur l'exécution des Contrats passés et jugemens rendus en pays étrangers, ib.* 638 ; *Mémoire sur l'exécution des jugemens entre les Souverains.*

Massé, Le Droit Commercial dans ses rapports avec le Droit des Gens et le Droit Civil, tome ii. c. i. Des Relations Internationales Individuelles, ou Du Droit International Privé (A.D. 1874, 3rd ed.).

Merlin, Répertoire de Jurisprudence ; tit. "Etranger" and "Souveraineté."

M. Cochin, Œuvres complètes, édit. Paris, 1821.

Demolombe, Cours de Code Civil, tome i. tit. i. c. iii. *Quelle est la condition juridique des étrangers en France*, and tit. iii. *Du Domicile*, A.D. 1845.

Demangeat, Histoire de la condition civile des Etrangers en France, A.D. 1844.

Legat, Code des Etrangers, ou Traité de la Législation Française concernant les Etrangers, A.D. 1832.

Thöl, Das Handelsrecht, I. Einleitung, A.D. 1847.

Puttlingen, Die gesetzliche Behandlung der Ausländer in Oesterreich.

Kent's Comment. on American Law, I. 187.

Bell's Commentaries on the Laws of Scotland in relation to Mercantile and Maritime Law, vol. i. Introduction ; vol. ii. p. 1294. *International Law relating to Bankruptcy*, ed. Shaw, A.D. 1858.

Cole, On Domicil of Englishmen in France, A.D. 1857.

Franck, De Bodmeria, Lübeck, 1862.

Das Handels-, See-, und Wechselrecht von Prof. Dr. Wilhelm Endemann, p. 487 (in the *Encyclopädie der Rechtswissenschaft* u. s. w. von Dr. Franz von Holtzendorff, Prof. der Rechte in Berlin, 1873). He says : "Das Handelsrecht im weitesten Sinne umfasst alle auf den Handel bezügliche Normen, auch die des öffentlichen Rechts, welche die staatsrechtliche administrative, so wie namentlich die internationale Regelung des Handels betreffen."

Boulay-Patey : Cours de Droit Commercial Maritime, Paris, 1854.

Papers on Maritime Legislation, with a translation of the German Mercantile Law relating to Maritime Commerce, by E. E. Wendt. 2nd ed. 1871.

Das allgemeine Deutsche Handelsgesetzbuch u. s. w., *mit Kommentar, herausgegeben von H. Makower.* Berlin, 1885.

IV. Writers on Private International Law, *per se* :—

P. Voet, De Statutis eorumque concursu, ss. 4, 9, 10, 11, upon the Collision of Statutes (A.D. 1661).

J. N. Hertius, De Collisione Legum (A.D. 1688). *Comment. et opuscul.* vol. i. pp. 118–154.

L. Boullenois, Traité de la personnalité et de la réalité des Loix, &c. (1766, A.D.). It is a French translation with considerable additions of Rodenburg's work.—*D. Meier, De Conflictu Legum* (A.D. 1810).

G. F. Struve, Ueber das positive Rechtsgesetz in seiner Beziehung auf räumliche Verhältnisse (A.D. 1834).

W. Schäffner, Entwickelung des internationalen Privatrechts (A.D. 1841).

Pütter, Das praktische Europäische Fremdenrecht, A.D. 1845.

Wächter wrote some excellent numbers, "Ueber die Collision der Privatrechtsgesetze," in a German publication entitled "*Archiv für die civilistische Praxis*," 24th and 25th volumes (A.D. 1841–2).

Rocco : Dell' uso e autorità delle leggi del Regno delle Due Sicilie considerate nelle relazioni con le persone e col territorio degli Stranieri (A.D. 1837).

Fœlix, Du Droit International Privé, ou du Conflit des Lois de différentes Nations en matière de Droit Privé (edition by M. Demangeat in 1856).

Henry, Judgment in *Odwin* v. *Forbes*, A.D. 1823.

Story, Commentary on the Conflict of Laws, ed. 1872.

Burge, Commentaries on Colonial and Foreign Laws generally, and in their conflict with each other and the Law of England, A.D. 1838.

R. Phillimore, The Law of Domicil, A.D. 1847.

Westlake, Private International Law, A.D. 1880.

Savigny, System des heutigen Römischen Rechts, Achter Band, A.D. 1849.

This eighth volume of the author's great work is entirely occupied with Private International Law.

Bar, Das internationale Privat- und Strafrecht. Hannover, 1862.

Lawrence, Commentaire sur les Eléments du Droit International, &c. de Wheaton, Tome iii. Leipzig, 1873.

Wharton, On the Conflict of Laws, Philadelphia, 1872.

V. The decisions of Courts of Justice of Independent States upon questions involving a conflict of Laws. See *Brightly's* decisions of the American Federal Courts : title, "Conflict of Laws."

VI. Lex Mercatoria of Independent States.

VII. Civil Codes of States into which express provisions on the subject of Private International Law have been incorporated.

CHAPTER II.

PLAN OF THE WORK.

XXVI. In the former Chapter it has been stated that the Judge who has to decide as to a particular Jural Relation which comes into contact with the laws of divers States, ought, as a general rule, to arrive at his decision by applying to that particular Jural Relation that positive law to which it is, according to its true nature, properly subject. All positive law is derived from a State (*a*), that is, from a particular defined territory occupied by a particular people, governed by their own Ruler.

The enquiry, therefore, to what positive law a particular Jural Relation is, according to its own nature, subject, necessarily involves the further enquiry as to the territory from which the positive law is derived. This necessarily leads to a further enquiry as to what are the ties which bind an individual (*persona*), and all that appertains to his personal rights (*Status, l'état du droit, Rechtszustand*), to a particular territory so as to subject him to its laws.

XXVII. We may consider the individual (*persona*) *in himself*, with his personal rights, abstractedly; that is, without reference to other considerations than the actual place in which he corporeally exists or resides; and then these ties appear to be of a twofold character, arising out of—

1. Origin;
2. Domicil.

It is by reference to the positive law of his Origin or his Domicil, that the *personal state* or legal condition of

(*a*) Vol. i. pt. i. c. i.

the individual—his *status*—his *capacity of actually acquiring* or *being passively the subject* of Jural Relations—is to be ascertained.

XXVIII. But we must also consider the individual with reference to his *acts*, and the Jural Relations which accrue therefrom: and then, in order to discover to what positive law these Jural Relations should be subject, we are led beyond the consideration of the particular territory to which, by Origin or Domicil, the individual may be attached.

The positive law of the territory in which the *acts* of the individual have been done, from which these Jural Relations have accrued, must be considered, and also the positive law of the territory of other individuals with whose Jural Relations his acts have brought him into contact.

These Jural Relations may be classified under the two great categories of—

1. Jural Relations of Family;
2. Jural Relations of Things or Property.

XXIX. The positive law which should govern these Jural Relations, when they are in contact with divers positive laws, should be the positive law to which they are naturally subject; or, as it is sometimes said, the law of the territory in which the Jural Relation has its seat.

Or it may be thus expressed: the individual is connected with positive law in a threefold manner, namely,

1. By his person;
2. By his acts;
3. By his property.

XXX. In the present treatise it is proposed to consider both—

1. What law ought to govern the particular Right or Jural Relation which comes in contact with divers laws; and

2. What law by the consent of States does practically govern such Jural Relation.

The arrangement of the subject will be as follows:—To consider—

First, Origin and Domicil; and, as necessarily connected therewith, the Personal *Status* of the Individual.

Secondly, the Legal Relations arising from *Family*—under which head will be included—

1. Marriage and Divorce.
2. Legitimacy.
3. Parental authority over
   a. Persons
   b. Property
   } of Children.
4. Guardianship.

Thirdly, Property—under which head will be included—

1. Rights to specific things;
   a. Immoveables.
   b. Moveables.
2. Rights to compel certain persons to do certain things, or Obligations—of which Contracts are a branch.
3. Rights relating to Succession, whether *Testamento* or *ab Intestato*.

Fourthly, The rules which govern the *Form and Manner of Procedure* in actions or suits in which the subject of a Foreign State is Plaintiff or Defendant.

Fifthly, *Criminal International Law*, which concerns the *unlawful acts* of a subject of a Foreign State (*b*).

(*b*) This is treated of by *Fœlix* under Private International, but by *Savigny* as a matter of Public International, Law, because the State is prosecutor. *Vide antè*, vol. i. pt. iii. c. xviii. "Right of Jurisdiction over Persons." An essay on this subject has been written by a late Home Secretary, Sir George Cornewall Lewis.

CHAPTER III.

ORIGO.

XXXI. The expressions "*Origo*" (*a*) and "*Domicilium*" (*b*) have been engrafted into all modern jurisprudence from the Roman Law. Savigny (*c*), however, justly warns us against the danger of a false application of supposed technical expressions of that law, as connected with these words.

The warning, however, is not needed, or scarcely needed, as to the word *domicilium*, the Rules of Law respecting which have not been essentially modified by modern usage, and which in practice are correctly applied.

But with respect to the word *Origo*, the case is different. A greater danger of mistake exists as to it; not on account of any obscurity in the Roman decisions upon the subject, but because the modern *status* of the individual differs essentially from that which he possessed under the Roman Empire. This is a danger of which the practice of modern law scarcely admonishes us.

The word *Origo* is so easily translated into the words *place of birth* (*lieu de la naissance—Geburtsort*), that modern jurists (including among their number those who were acquainted with the true meaning of *Origo* in the Roman Law) have frequently so rendered it:—"The mere place of birth," Savigny says, "is an accidental circumstance without any "legal influence whatever." The

(*a*) *Origin. L'origine, Herkunft.*

(*b*) *Domicil. Domicile, Wohnsitz,* [*Woonplaats, Domicilio.*]

(*c*) *R. R.* viii. s. 350. The following slight sketch is chiefly taken from his large picture.

English lawyer, at least (*d*), is aware that this statement is too broad, inasmuch as the mere accident of birth in English territory is attended with most important legal consequences to the person born therein (*e*). The French lawyer knows that the individual who is domiciled in France may yet be, in many civil respects, considered as a foreigner. And in [the German cantons of] Switzerland (*f*), as Savigny himself afterwards remarks, there is a *jus originis* springing from *birth* in a particular *commune*, and a *jus domicilii*, from domicil in a *commune*, the former overruling the latter in the more important Jural Relations.

XXXII. Towards the close of the Republic and during the first centuries of her Empire, Italy, with the exception of Rome, consisted of a variety of urban communities which were called, for the most part, *municipia* and *coloniæ*. Each of them possessed a kind of constitution of their own —their own magistrates, their own jurisdiction, and sometimes their own legislation. Every inhabitant of Italy appertained either to Rome or to one of these urban communities.

The provinces, on the contrary, had originally very various constitutions; but these, in the time of the great jurists of the two first Christian centuries, had become assimilated with the Italian communities. The general appellation of these urban communities was *civitates* or *reipublicæ*: their domain was designated *territorium*, an expression which occurs often in the Justinian compilations, and sometimes *regio*. The *vici* were rural subdivisions of the *civitas*. The individual was bound to the urban community in two ways: 1st, by the Right of Citi-

(*d*) *Vide post*; and see *Story*, ss. 51–74, for the opinions of Foreign Jurists, which, he says (s. 81), lay down, "that the law of the domicil of origin, *or*, the law of the actual domicil, is of universal obligation as to the capacity, state, and condition of persons." Very unsatisfactory, it must be admitted.

(*e*) *Vide post*, § xxxiv.

(*f*) *Savigny, R. R.* s. 358. It is remarkable that this peculiarity appears to have no connection with the Roman jurisprudence; *vide post*.

zenship generally founded on birth (*Origo*) (*g*); 2, by the.... Right of Domicil (*domicilium*) within the *territorium* (*h*).

XXXIII. There are certain passages in the Roman Law which classify the free inhabitants of the Empire as follows—*Cives*, *Latini*, *Peregrini*, which classification at first sight appears to apply to each class a determinate positive law: but this is not so. The classification did indeed materially affect the capacity of individuals, *e.g.* the *Cives* had *connubium* and *commercium*—the *Latini* had *commercium* only—the *Peregrinus* had neither: but the classification has no bearing on the consideration to which entire system of positive law the individual was subject (*i*).

The tie which bound the individual to an urban community, or, speaking generally, municipality, whether it sprang from *origo* or *domicilium*, produced three effects or consequences.

1. It subjected him to a share of the *burdens and charges* (*munera*) of the community (*k*).

2. It subjected him to the *jurisdiction* of the community (*forum originis vel domicilii*). The plaintiff (*actor*) was bound to institute his suit in the *forum* of the defendant (*rei*), but he might choose *the forum originis* or the *forum domicilii*.

3. It fastened upon him *the particular law* of the community as a *personal attribute* (*lex originis—domicilii*).

This last of the three effects or consequences Savigny (*l*) points out as of extreme importance. There is, he says,

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(*g*) "Municipem aut nativitas facit, aut manumissio, aut adoptio." *Dig.* lib. l. t. i. 1.

(*h*) "*Cives* quidem *origo* manumissio allectio vel adoptio, *Incolas* vero . . . *domicilium* facit."—*Cod.* lib. x. t. xxxix. 7.

(*i*) *Savigny*, *R. R.* s. 356.

(*k*) *Muneris particeps*—but the exact primitive meaning of this word is doubtful; it came to be the designation of all who, out of Rome, had rights of citizenship, their connection with their particular community being generally expressed by the word *origo* or *patria*.

(*l*) *Savigny*, *R. R.* s. 356.

an intimate connection between all the three effects, but especially between the two last (*m*), which are to be regarded but as different sides of one whole—different appearances of the same local or territorial law to which the individual is subject.

The intimate connection between the *jurisdiction* of, and the *particular law* derived from, the Community is a principle which extends beyond the mere antiquarian consideration of the Roman Constitution; it lies, in fact, at the root of the existing Private International Law; it furnishes the true solution of the problem, What law shall govern that Jural Relation which comes in contact with the law of divers territories (*n*)?

XXXIV. The observations in the last section are applicable, it will be remarked, to the tie by which *Domicilium*, as well as to that by which *Origo*, binds an individual to a State. In truth, the effect of mere Origin or Birth in binding the individual to a particular territory, and subjecting him to the law thereof, appears chiefly in the consideration of Public International Law, and has been treated of in an earlier volume of this work in a chapter upon "The right of Jurisdiction over Persons" inherent in the government of every independent State (*o*); and

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(*m*) See, too, *Bynkershoek, De Foro Leg.* c. ii.; *Forum competens*, founded by *origo et natura*. *Subjectio duplex*—1, *rei*, 2, *personæ*.

(*n*) This appears to me to give fairly, as far as the English language will allow, *Savigny's* meaning.

(*o*) Vol. i. pt. iii. c. xviii.: "Right of Jurisdiction over Persons." In *Shedden* v. *Patrick*, 1 *Macqueen's House of Lords Cases*, p. 611, Lord Chancellor Cranworth observes, that in England, *independently of Statute Law*, and with certain exceptions, every one *born* abroad is an alien. See, also, *Mr. Westlake's Private International Law*, c. ii.

The English Statutes are 25 Edw. III. stat. 1; 7 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21; 7 and 8 Vic. c. 66, s. 3, [which is now repealed by 33 Vic. c. 14].

English Leading Cases.—*Bacon's Case, Croke's Car. Reports*, p. 602. *Doe* v. *Jones*, 4 *Term Reports*, p. 308.

Countess de Conway's Case, 2 *Knapp's P. C. Rep.* p. 364.

Count de Wall's Representatives Case, 6 *Moore's P. C. Rep.* p. 216.

also the collateral question as to the acquisition of a new and the loss of an old national character. The theory of *Domicil* has in fact, with few but important exceptions, swallowed up the theory of *Origin* in all matters of Comity.

The effect of Origin is, however, still seen when the positive law of the State in which a man is born affixes an indelible incapacity upon its subject to do certain acts, and enter into certain obligations. Thus, in Switzerland the *jus originis* of the *commune* may decide, in preference to the *jus domicilii*, both the local positive law and the forum in suits concerning Divorce and Succession. The law of England incapacitates an Englishman from possessing a slave in any State, and certain members of its Royal Family from contracting marriages (*p*) in any State without certain previous consents. The law of England also applied the law of treason—though this is a matter of Public International Law—with great severity, affixing, till quite recently, on all who *have been born* from parents who are not enemies (*q*) within its territory an indelible allegiance, and therefore an indelible incapacity to bear arms against herself (*r*). So with regard to incestuous

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These two last Cases, and *Bacon's* Case, were before the 7 & 8 Vic. c. 66, s. 16 of which makes the foreign wife of an Englishman an Englishwoman; and it has been holden in a criminal case that she cannot refuse this character, but must accept it with its advantages and disadvantages.—*Maria Manning's Case*, 2 *Carrington & Kirwan's Rep.* p. 887; also of course before 33 Vic. c. 14, which repeals the former statute.

[See *De Geer* v. *Stone*, *L. R.* 22 *Ch. Div.* p. 243.]

As to the status of wives under the present law (33 Vic. c. 14), see vol i. § cccxxxi.

(*p*) 12 George III. c. 11.

Sussex Peerage Case, 11 *Clark & Finnelly's Rep.* p. 85.

(*q*) See this exception, *Calvin's Case*, 7 *Coke's Rep.* p. 18 a.

(*r*) See the celebrated case of *Æneas Macdonald*, 18 *State Trials*, p. 857. He had not been in Great Britain since his infancy, but he was born there. In 1745 he was taken in arms under a French commission, and holden guilty of treason.

See, too, *Drummond's Case*, 2 *Knapp's P. C. Rep.* pp. 295, 311, 314.

marriages; under which head it is to be observed that the Law of England at present places marriages with the wife's sister, making, as it does, no difference between relations by consanguinity and by affinity (*s*). This subject is further discussed in a later part of this volume, which deals with the law relating to Foreign Marriages.

XXXV. M. Demangeat, in his endeavour to answer the question, What is the circumstance which determines for each individual his personal law? justly observes, that if the domicil of the individual were always and necessarily identical with the territory of the State to which he belonged, it would be enough to say, by way of answer to the question, that the personal law of the individual is the law of the place wherein the individual is domiciled (*t*).

But it may happen in France that a person may be domiciled in France, and yet not cease to be *étranger*: for *incontestablement cela est possible*, M. Demangeat says: nay, he may be even domiciled with the permission of the French government, and yet remain *étranger*. In this latter case what would be his personal law?

M. Demangeat observes that when the personal law serves to disclose to us the intention of the individual, there is no difficulty in saying that it is the positive law of his domicil (*du domicile*), not the law of his Origin or State (*de la patrie*), which is his personal law; thus the French courts have decided that a domiciled foreigner,

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Fitch v. *Weber*, 6 *Hare's Rep.* p. 65.

With respect to the *status* of aliens, and the capacity of subjects to expatriate themselves under the present English law, see vol. i. § cccxxxi. As to the American (U.S.) law, see *Wharton*, §§ 3, 4. By an Act of July 27, 1868, expatriation is declared "a natural and inherent right of all people," a proposition which can of course not be considered as one of International Law, because one State has thought proper to incorporate it into its own law.

Et vide infra, chapter xvii.

(*s*) See *Story*, ss. 86-88. From s. 113(a) to 119 he discusses the question and condemns the English Law; though his reasoning at s. 116(a) is strange.—*Sed vide post.*

(*t*) *Revue Pratique de Droit Français*, tome i. n. 2, p. 65.

marrying without a marriage settlement, subjects himself to the *communauté légale* of the Code Napoléon. So, in the *succession mobilière*, the personal law of the Domicil is applied. The real difficulty is to ascertain the personal law when a question of *status* (*d'état ou capacité*) arises. And M. Demangeat is, on the whole, of opinion, though, as it would seem, with less confidence, that even in this case the personal law is the law of the Domicil,—both of that *de facto* and of that under permission of the government (*u*),—that it was the intention of the compilers of the 13th Article of the Code Napoleon, that the foreigner, so domiciled, should be likened *en ce qui concerne le droit privé* to the Frenchman, and if the concluding part of the 13th Article seems to say that the French law is the personal law of the Frenchman, the answer is that the Article contemplated the Frenchman who was *resident*, but not the Frenchman who was *domiciled* abroad. These observations, however, anticipate the consideration of the law as to personal *status*, to which, perhaps, they more properly belong.

XXXVI. Questions relating to the effect of the *lex originis* upon the individual and his personal *status*, which may arise between a State and her colonies (*x*), generally belong to the department of Public rather than International law; while, upon this question, with the abovementioned exception, Private International Law refers to the *lex domicilii*, which is the subject of the following chapter.

(*u*) "*Acquis dans toute la force du terme.*"

(*x*) Birth in an English colony is at present equivalent to birth in England for all questions of origin as distinct from domicil.—(*Donegani* v. *Donegani*, 3 *Knapp's P. C. Rep.* p. 63; *Re Adam*, 1 *Moore's P. C. Rep.* p. 460.) As to naturalization in colonies, see 33 Vic. c. 14, vol. i. p. 653 App. It is possible that the power of self-legislation in the colonies may give rise to serious questions, *e.g.* the validity of a divorce decreed in England upon parties domiciled in a colony where a divorce is illegal. The English Divorce Court would not, it is true, adjudicate wittingly on such a case, but it might do so unwittingly. Various other instances might be suggested.

CHAPTER IV.

DOMICIL.

XXXVII. (*a*) We have now to consider the question of Domicil, the second of the ties which bind, or of the causes which subject, the individual to the jurisdiction of a particular territory (*b*).

"Questions of Domicil" (said Lord Chancellor Cottenham) "are frequently attended with great difficulty, and "the circumstances which give rise to such questions are "necessarily very various; it is of the utmost importance "not to depart from any principles which have been es- "tablished relative to such questions, particularly if such "principles be adopted not only by England, but generally "by the laws of other countries" (*c*); and Cochin truly observes: "Les questions de domicile dépendent d'un "grand nombre de circonstances qu'il faut réunir" (*d*).

Domicil is, therefore, principally a question of fact; and though also, in some degree, a question of law, the former ingredient predominates—the contrary of which may be predicated of Origin (*e*).

XXXVIII. The Roman law is the great repository of the principles of this, as of most other branches of civil

(*a*) *Donelli Comment. de Jure Civili*, lib. xvii. c. ix. : "Quis sit in jurisdictione competens judex : seu de foro competenti : seu *quod idem valet*, ubi quis agere vel conveniri debeat. Ac primum de territorio, et causis cujusque jurisdictioni attributis;" c. xii. : "Ubi subjiciatur quisque ex personâ suâ jurisdictioni, tum quibus de causis : et in his primum *de domicilio*."

(*b*) "*Jus terrendi*—unde *territorium* dictum volunt."—*Ib.* cxii. 10.

(*c*) *Munro* v. *Munro*, 7 *Clark & Finnelly's Rep.* p. 876.

(*d*) *Œuvres*, tome iv. p. 52, édit. Paris, A.D. 1821.

(*e*) *Westlake*, 31, note a.

jurisprudence. The Roman jurist bestowed great attention upon the different bearings of this question, and all the disquisitions and pains of modern lawyers have been engrafted upon the luminous investigation of the subject contained in the Digest and the Code.

XXXIX (*f*). The universal extent, indeed, of the Roman Empire, excluded the possibility of any question of domicil arising between the subjects of Rome and those of another kingdom; but the necessity of considering domicil, as between the inhabitants of different parts of the same kingdom, was forced upon their jurists by various circumstances, principally by the oppressive nature of the duties and responsibilities incident to the Decurionatus, or municipal office (*g*). Under the Emperors, the *decuriones*, who collected the imperial taxes, became responsible for the payment of the fixed amount, and were compelled to supply the deficiencies from their own property. Each *decurio* was, moreover, considered as a guarantee for the solvency and good faith of his colleague, and for the successor whom he had presented to fill the office which he vacated. This grievous oppression made every citizen as anxious to escape as he had been formerly desirous to obtain the honour (*h*); but the law imposed upon everyone who had his *domicilium* in a particular place, the necessity of filling the public offices, and discharging the duties incident to them in that place. So also with respect to the assessment and payment of taxes, Domicil was of much importance; hence the *criteria* of it

(*f*) In some of the earlier English cases, this has been alleged by counsel as a reason why little or nothing was to be found in the Roman law on the subject of domicil; one of the many proofs how very slight the acquaintance of English lawyers with that law has been. *Munroe* v. *Douglas*, 5 *Maddock's Rep.* p. 291. *Attorney-General* v. *Countess of Dalhousie*, 7 *Clark & Finnelly's Reports*, p. 840.

(*g*) *Savigny*, *R. R.* viii. s. 353.

(*h*) "Sed si aliis rationibus domicilium in splendidissimâ civitate Laodicæorum habere probatus fueris, mendacium quominus muneribus fungaris non proderit."—*Code*, lib. x. t. xxxix. 2.

are more fully examined in the passages of the Digest and the Code which relate to these subjects—but not alone in these passages—for in discussing the question as to the difference between the "civis" and the "incola" (*i*) of a province—as to the Tribunal before which a person should be convened—when and under what modifications the doctrine of Prescription should take place—what causes excused the Tutor from accepting the office imposed upon him—in discussing these and various other subjects, the question of domicil was frequently brought under the consideration of the jurists of ancient Rome (*j*).

(*i*) "Incolas vero domicilium facit," *Cod.* lib. x. t. xxxix. 7. *De Incolis. Vide post.* To *Origo* belonged the expressions *municipes, jus originis, patria*; to *Domicilium*, the expressions *incolæ, jus incolatûs, domus.*—*Savigny, R. R.* viii. s. 353.

(*j*) The following passages should be studied in the Digest and Code for an accurate acquaintance with the language of Roman jurisprudence on the subject of Domicil:—

Dig. lib. i. t. ix. 11—De Senatorum domicilio.
Dig. lib. ii. t. xv. 8—De Transactionibus.
Dig. lib. iv. t. vi. 28—Ex quibus causis majores viginti quinque annis in integrum restituuntur. De absentiâ.
* *Dig.* lib. v. t. i.—De Judiciis, et ubi quisque agere vel conveniri debeat.
* *Dig.* lib. xxvi. t. v.—De Tutoribus et Curatoribus datis, &c.
Dig. lib. xxvii. t. i. 30, 46, § 2—De Excusationibus.
Dig. lib. xlvii. t. x. 5—De injuriis et famosis libellis.
* *Dig.* lib. l. t. i.—Ad Municipalem; et de Incolis.
Dig. lib. l. t. xvi. 190, 239—De verborum significatione; *Dig.* lib. xxiii. t. ii. 5—De ritu nuptiarum; *Dig.* lib. xl. t. v. 28—De fideicommissariis libertatibus.
* *Cod.* lib. vii. t. xxxiii.—De præscriptione longi temporis, decem vel viginti annorum.
* *Cod.* lib. x. t. xxxix.—De Incolis, et ubi quis domicilium habere videtur, et de his qui studiorum causâ in aliâ civitate degunt.
Cod. lib. vi. t. xxiii. 9, has this passage: "si non *speciali privilegio patriæ tuæ* juris observatio relaxata est, &c. &c. nullo jure testamentum valet."

"De Interdictis et Relegatis et Deportatis." The Præses who *interdicted* a person *domiciled* in his province, had also the power to interdict him from the place of his *origin*.

The * denotes the most important passages.

XL. It is the remark of a great modern jurist that the Canon Law, where it modifies the Civil Law, has obtained a European reception as general as that law itself (*k*).

Dissertations on the Law of Domicil under that system of jurisprudence were provoked by various causes—such as the prohibition imposed on the Presbyter to administer sacred rites to a person belonging to the congregation (*parochianus*) of another church—the law that a person in holy orders might become subject (*subditus et diœcesanus*) to the jurisdiction of a bishop *ratione domicilii* (*l*) —the law which, in order to check the encroachment of religious houses upon parochial churches, ordered a certain portion (*canonica portio*) of the ecclesiastical dues of sepulture to be paid to the parish church of the domicil of a deceased person, who had desired to be buried with the members of a religious fraternity. With reference to these and other subjects, rules were laid down, and opinions were given by Canonists how a domicil might be created, acquired, and abandoned (*m*).

XLI. Savigny, in his learned work on the History of the Roman law in the Middle Ages, ascribes the growth of personal rights, and personal as opposed to territorial laws, to the state of society which ensued on the conquest of the Roman Empire by the barbarians, after which both races lived together preserving their separate manners and laws. "The moderns," he observes, "always assume "that the law to which the individual owes obedience is

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(*k*) *Savigny*, *R. R.* i. s. 17—"Denn auch dies hat eine gleich allgemeine Europäische Anerkennung gefunden, wie das Römische."

(*l*) *Lyndwood*, *Const. Oth. de Scrutinio Ordinandorum.* Gloss. i. *per Episcopum.* (Oxford ed. 1679.)

(*m*) A very elaborate disquisition on the subject is to be found in the *Treatise* of *Augustin Barbosa* de officio et potestate Episcopi, pars secunda, Allegatio IV. p. 172 ; see also 6 *Decretal.* lib. iii. t. xii. c. ii. ; *Decretal.* lib. i. tit. iii. c. xxix. ; see also *Dictionnaire de Droit Canonique*, tit. *Domicile*, and *Denisart*, *Domicile*, s. 40. See also the cases collected by *Mascardus*, in his great work *De Probationibus*, Conclusio 535, v. 1.

" that of the country where he lives; and that the pro-
" perty and contracts of every resident are regulated by
" the law of his domicil. In this theory the distinction
" between native and foreigner is overlooked, and national
" descent is entirely disregarded: not so, however, in the
" Middle Ages, when, in the same country, and often
" indeed in the same city, the Lombard lived under the
" Lombardic, and the Roman under the Roman law." (*n*).

XLII. When the darkness of the Middle Ages began to disappear, and the pacific intercourse of European nations to increase, the subject of Domicil came to be discussed by writers on Public and International Law (*o*). As the subjects of one kingdom began to migrate into and reside in other countries, the various questions, arising from a conflict between the municipal regulations of the original and adopted country, gave importance to the Law of Domicil, and rendered the maintaining a uniformity of rules respecting it in Christendom a matter of great consequence.

The circumstance which has most contributed towards producing this effect has been the universal and increasing value of *personal* property. The Roman law made but slight distinction between the rules applicable to personal and real property. This distinction issued from the maxims of the feudal code: from these, and from the comparatively insignificant value (*p*) of *moveables* or

(*n*) *Cathcart's Translation*, vol. i. c. iii. s. 30. See also *Story's Conflict of Laws*, ch. i. s. 2, note, where this passage is cited.

(*o*) In the great American case of the *Venus*, it was said by Mr. Justice Marshall, that "Grotius nowhere uses the word 'Domicil'" (8 *Cranch's Reports*, p. 278). This is a mistake, for the word is used by him, lib. ii. c. v. s. 24, "Romanis legibus, saltem posterioribus, domicilium quidem transferre licebat;" the quotation is given at length in another part of this work. But it is among the writers who followed in the track which this illustrious man had opened, that the word is of frequent occurrence, and the thing constantly discussed.

(*p*) *Blackstone's Commentaries*, book ii. chap. xxiv.: "Hence it was that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion of all the *moveables* of the subject, was frequently laid without scruple,

chattels, arose the maxim, generally received in Europe, that moveables followed the person (*mobilia sequuntur personam*); while land was governed by the law of the country in which it was situated (*lex loci rei sitæ*) (*q*). The progress of trade and commerce has since imparted to the law of chattels an interest and importance at least equal to that which regulates real estates.

XLII.A. Mr. Wharton, however, after an elaborate and able discussion, arrives at the following conclusion:— "Moveables, when not massed for the purposes of Suc- "cession or Marriage transfer, and when not in transit or "following the owner's person, are governed by the *lex* "*sitûs*, except so far as the parties interested may select "some other law." This, he says, is "The Rule of Inter- "national Law" (*r*). It may be that this rule will one day be adopted—very much is to be said for it; but that day can hardly be said to have yet arrived. The peculiar doctrine of the English law as to personalty would aid in the establishment of this qualified *lex sitûs* rule, because a leasehold for a thousand years is by English law considered [in many respects to be] personal property; and if *bona mobilia* were to be considered as identical with personalty, a great absurdity would be the result of applying any other than the *lex sitûs* rule. But a recent and very important decision by Lord Chancellor Selborne will seem to show that the doctrine *bona mobilia sequuntur personam* is not to be applied to all classes of personalty by English law. In

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and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders." Mr. Reeves remarks that chattels are scarcely mentioned as objects of importance in treatises or reports before the time of Henry VI.—*Hist. of English Law*, vol. iii. s. 69, p. 15. It is in the reign of Richard III. that the Duke of Buckingham urges his master to grant him "The Earldom of Hereford and the *moveables*."—*Richard III.* act iv. sc. 2.

(*q*) All jurists of all countries agree in this position: so that, in the language of *Bynkershoek*, "Adeo recepta hodie sententia est ut nemo ausit contra hiscere."—*Quæstiones Juris Privati*, lib. i. c. xvi.

(*r*) *Wharton, Conflict of Laws*, s. 311.

the case of *Freke* v. *Lord Carbery* (*s*), it was holden that the validity of a testamentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicil; and that where a testator domiciled in Ireland by his will gave an English leasehold to trustees upon trust for sale, with directions to accumulate the interest of the proceeds for a period extending beyond the time allowed by the Thellusson Act (which act does not extend to Ireland), the direction to accumulate the interest of the proceeds beyond the time allowed by the Thellusson Act was invalid. The Supreme Court in America has also holden that the fiction of law, that the domicil of the owner draws to it his personal estate, wherever it may happen to be, yields whenever, for the purpose of justice, the actual *situs* of the property should be examined (*t*).

XLIII. Of modern nations France, Italy, Holland, America, and Germany (*u*), and lately England, have pro-

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(*s*) *L. R.* 16 *Eq.* p. 461.

(*t*) *Green* v. *Van Buskirk*, 7 *Wall.* (*Americ.*) p. 139.

(*u*) These, among other writers, may be mentioned :—

Cujacius, On Code, lib. vii. t. xxxiii. De Præscriptione, &c.; on Dig., lib. xxvii. De Excussationibus.

J. Voet, lib. v. t. i. 92, &c. Comment. on Dig. lib. v. t. i. De Judiciis, especially useful to those who wish to prosecute their studies further into the Civilians, from his frequent references to *Zangerus*, *Donellus*, *Christinæus*, and *Struvius*.

Bynkershoek—Quæstiones Juris Privati, lib. i. c. xvi.

Barbosa—De Off. Episcopi, part ii. all. iv.

Mascardus—De Probationibus, Concl. 535.

Carpzovius—Processus Juris, t. iii. a. l. Forum competens quodnam dicatur ratione domicilii.

Tractatio de Domicilio Eberhardina, Præside Wolfgang Adamo Lauterbach, 1663. This is, perhaps, not to be reckoned among the books generally accessible, but it contains the best *separate* treatise on Domicil which the Germans have produced.

Savigny—R. R. viii. ss. 351–359.

Denisart—Collection de Décisions, tit. Domicile.

Pothier—Introduction Générale aux Coutumes d'Orléans.

Merlin—Répertoire de Jurisprudence, tit. Domicile.

Domat—Loix Civiles dans leur Ordre Naturelle. Le droit public, liv. i. tit. xvi. s. 3.

duced elaborate commentaries on the Law of Domicil, and for a like reason, namely, the division of their territory into divers provinces, governed by divers customs and ordinances. In these countries no question could be more material to the individual than to ascertain to which law his person, his money, his dealings, and his testament were subjected by the place of his domicil; before the Revolution no less than two hundred varying and conflicting customs were furnished by the provinces of France. In the United States of America, the subject, from a similar cause, has undergone frequent and careful investigation. In England the consideration of it is of comparatively recent date (*x*). I find Sir Leoline Jenkins speaking of Domicil, in the reign of Charles the Second, "as a "term not vulgarly known" (*y*): and the answer of this learned civilian to the statement of the French lawyers, claiming for the Duchess of Anjou the succession to the Dowager Queen Henrietta Maria's goods, as having died domiciled in France, is the earliest exposition in England of the Law of Domicil which I have been able to discover. In this case, Sir Leoline Jenkins admitted, that the Law

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Toullier—Le Droit Civil Français suivant l'Ordre du Code, liv. i. t. iii. 362–378.

Locré—Législation de la France, liv. i. tit. iii. tome iii. édition Paris, A.D. 1827.

Story—Commentaries on the Conflict of Laws, ch. iii.

Kent—Commentaries on American Laws, part v. lecture 35; part vi. lecture 37.

R. Phillimore—On the Law of Domicil.

Cole—On the Domicil of Englishmen in France.

Westlake—On Private International Law, ch. iii. On Domicil.

Lawrence—Commentaire sur les Él. du Droit International, Seconde Partie, chap. ii. 5, Lex Domicilii. (Tome iii. p. 96, édition A.D. 1873, Leipzig.

Wharton—Conflict of Laws, ch. ii.

(*x*) See remarks of Lord Campbell, in *Advocate-General* v. *Thomson*, 12 *Clark & Finnelly's Rep.* p. 28, cited at length below.

(*y*) See his letter to King Charles the Second from Niméguen, 1676, as to the sentence pronounced by the Scotch Court of Admiralty upon a Swedish vessel.—*Life of Sir L. Jenkins*, vol. ii. p. 785.

of a fixed domicil ought to regulate the disposition of the personal property of every deceased person (*z*). This doctrine was subsequently upholden by Lord Chancellor Hardwicke, about the middle of the last century, and was finally confirmed by Lord Chancellor Thurlow in the great case of *Bruce* v. *Bruce* (*a*), appealed from the Scotch Courts to the House of Lords in 1790. The opinions of these high authorities seem not to have reached Scotland in a fully authentic shape, and it required another decision of the House of Lords firmly to engraft this principle of jurisprudence upon Scotch law (*b*).

(*z*) "Ne mérite pas le nom d'un domicile fixé et tel qui doit régler la succession, soit qu'on en juge selon le droit de France ou selon celui de l'Angleterre, ou bien selon le droit Romain qui est commun à tant de nations."—*Life of Sir L. Jenkins*, vol. ii. p. 668. But the earliest cases judicially decided in England, upon the question as to the disposition of the personalty of a person, whose domicil was in one place and personalty in another, were the cases of *Cholmley* v. *Cholmley*, 2 *Vernon's Reports*, p. 47, in 1683, and of *Webb* v. *Webb*, 1689, *Robertson on Personal Succession*, p. 105; in both which the Court of Chancery pronounced that the custom of London followed the person and prevailed over the custom of York, which was the law of the domicil. In these cases the deceased parties were freemen of London; and, as late as 1826, there has been a decision confirming this anomaly to the general law of domicil in favour of the custom of the City of London.—*Onslow* v. *Onslow*, 1 *Simons' Reports*, p. 18.

Lord Hardwicke appears to have been the first judge who clearly laid down the law in England, "that the personal estate follows the person and becomes distributable according to the law or custom of the place where the intestate lived." This was in a case decided in 1744.—*Pipon* v. *Pipon*, *Ambler*, p. 25. In *Thorne* v. *Watkins*, 2 *Vesey*, 35, the same judge, in 1750, pronounced that the case of a Scotch personal succession was regulated by an English Domicil.

In *Sill* v. *Worswick*, 1 *H. Blackstone*, p. 665, Lord Chancellor Loughborough said, "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of a science, that personal property has no locality.

(*a*) See note to *Marsh* v. *Hutchinson*, 2 *Bosanquet & Puller's Reports*, p. 299.

(*b*) *Hogg* v. *Lashley*, *Robertson's Appeal Cases*, p. 4, and see *Robertson on Personal Succession*, pp. 126-150. The earlier decisions as to the law in Scotland seem to have been correct, but there had been,

Of late years, the extent and variety of our colonial (*c*) dependencies, and the importance of the interests at stake, especially with regard to the marriage contract, governed by different laws in the north and south of the same kingdom, have produced a more accurate acquaintance with this branch of jurisprudence, in its application to British subjects; while during the long maritime war which grew out of the French Revolution, it came also to be considered in its application to the subjects of other nations, in our courts of International Law (*d*).

XLIV. In the following pages, it will be attempted to collect together and set forth, under each division of the subject, those maxims of jurisprudence relating to the Law of Domicil which are contained in the sources mentioned above, namely, in the Roman and Canon law, in the opinions of European and American jurists, the decisions of European and American tribunals, with a more especial reference to the decisions of the various Courts of Justice in Great Britain.

It will be seen that this question has undergone much discussion in Westminster Hall, in the Ecclesiastical and Admiralty Courts, the Privy Council, the Courts of Equity, and the House of Lords.

Mr. Bell says, "a very distressing versatility of opinion."—*Commentaries on the Law of Scotland*, vol. i. p. 683. It should appear, too, that the Ecclesiastical Courts had held the doctrine of the *lex loci rei sitæ*; but see *Somerville* v. *Lord Somerville*, 5 *Vesey*, p. 750; and the opinion cited above of Sir L. Jenkins.

(*c*) *Burge, Comment. on Foreign and Colonial Law*, vol. i. c. ii. Chapter on Domicil; *Henry, Report of the Case of Odwin* v. *Forbes*, Appendix.

(*d*) See first of the standing Interrogatories administered in the time of war, 1 *C. Rob. Adm. Rep.* p. 381. The decisions, however, of the Prize Courts on *Commercial* Domicil *in time of war* are only *sub modo* applicable to domicil *in time of peace*. *Vide antè*, vol. iii. § lxxxv.

CHAPTER IV. A.

DEFINITION OF DOMICIL.

XLV. The definition of Domicil, according to the Roman Law, is as follows:—

"Si quis negotia sua non in coloniâ sed in municipio "semper agit, in illo vendit, emit, contrahit, in eo foro, "balineo, spectaculis utitur: ibi festos dies celebrat: om- "nibus denique municipii commodis, nullis coloniarum "fruitur: ibi magis habere domicilium quam ubi colendi "ruris causâ versatur, videtur" (*a*) . . . "Et in eodem "loco singulos habere domicilium non ambigitur, ubi quis "larem, rerumque ac fortunarum suarum summam con- "stituit, unde rursus non sit discessurus, si nihil avocet, "unde cum profectus est, peregrinari videtur; quod si "rediit, peregrinari jam destitit" (*b*).

"Eam domum unicuique nostrûm debere existimari, ubi "quisque sedes et tabulas haberet, suarumque rerum con- "stitutionem fecisset" (*c*). "Domicilium re et facto "transfertur, non nudâ contestatione" (*d*).

Donellus justly observes as to the first of these definitions, "Sed majore venustate quam certitudine defini- "tionis" (*e*).

(*a*) *Dig.* lib. 1. t. i. 27, § 1.

(*b*) *Code*, lib. x. t. xxxix. 7.

(*c*) *Dig.* lib. 1. t. xvi. 203.

(*d*) *Dig.* lib. 1. t. i. 20.

(*e*) "Nam illa," (he says) "sedem rerum suarum alicubi constituere; unde non esse discessurum si nihil avocet; inde si quis profectus sit eum peregrinari videri, quæ sunt in superiore descriptione; si non æquè incerta sunt atque illud, alicubi domicilium habere, ut certè non sunt: incerta sunt tamen, et adhuc illam quæstionem desiderant, unde

XLVI. So that, according to a French civilian of high authority, "Those who have no intention of fixing their "domicil in a place, but are absent somewhere for conveni- "ence, necessity, or business, by no lapse of time can "create a domicil; since neither the intention without "the fact, nor the fact without the intention, is sufficient "for this" (*f*).

The definition of a modern French jurist is as follows:— "Domicil consists in the moral relation subsisting between "a man and the place of his residence, where he has fixed "the seat in which his fortune is administered, and the "establishment of his affairs. We say, the moral relation, "because domicil does not consist in physical existence, "nor in an actual residence in a place, but in the attach- "ment contracted by a person for the place which he has "chosen for the centre of his negotiations" (*g*). Whether this definition does, in reality, throw any clearer light upon the subject, may be well doubted.

XLVII. According to Vattel, "Domicil is a habitation "fixed in some place with an intention of remaining there "always" (*h*). Upon this an American judge remarks, "Probably the meaning of Vattel is that the habitation "fixed in any place, without any present intention of

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sedem alicubi ita constitutam intelligamus ex quo illa sequuntur quæ diximus. Pressius igitur, et certius sic domicilium cujusque privatum rectè definietur: ut sit locus in quo quis habitat eo animo, ut ibi perpetuò consistat, nisi quid avocet. In summâ, si distinctè dicendum est, duæ res domicilium constituunt, . . . habitatio cujusque, et animus ibi consistendi."—*Donellus De Jure Civ.* lib. xvii. c. xii. 3.

(*f*) *D'Argentré ad Leg. Britonum*, Art. 9, n. 4: "Quamobrem qui figendi ejus animum non habent, sed usûs necessitatis aut negotiationis causâ alicubi sint, protinus a negotio discessuri, domicilium nullo temporis spatio constituent: cum neque animus sine facto, neque factum sine animo, ad id sufficiat." Cited by *Denisart*, tit. Domicile, *Story, Conflict of Laws*, c. iii. s. 44.

(*g*) *Proudhon, Cours de Droit Français*, tome i. p. 119, cited with approbation in *Traité du Domicile et de l'Absence, par A. T. Desquiron*, à Paris, 1812, p. 42.

(*h*) *Vattel, Droit des Gens*, liv. i. c. xix. s. 218, Du Domicile.

" removing therefrom, is the domicil" (*i*); at least, he pronounces it " better suited to America." Vattel's definition is clearly inadequate to the notion of a principal (*j*) domicil received in British Courts of Justice.

XLVIII. Boullenois, in his Treatise on the Personality and Reality of Laws, &c., says:

"Though it be true that man is born to be in motion, and " to traverse this earth which God has given him, he is not " made to dwell in all the places which necessity compels " him to traverse; he must have a place of repose, a place " of choice and predilection, a place of society, a place " where he can enjoy, with his family, the advantages of " his labours and cares: this place it is which we call " Domicil, and where a man, by a kind of fiction, belongs. " He cannot be said to belong to a place unless he be " there in the spirit and meaning of abiding there, and " having his ordinary habitation there" (*k*).

XLIX. Lord Alvanley commends the wisdom of Bynkershoek (*l*) for hazarding no definition; and it must be admitted that among the various definitions (*m*) to be found in publicists, none are completely satisfactory. Donellus, after criticizing the definitions of the Roman Law, says, "Pressius igitur, et certius sic domicilium cujusque priva- " tum rectè definietur: ut sit locus in quo quis habitat eo " animo, ut ibi perpetuò consistat, nisi quid avocet" (*n*). Perhaps, however, the American Judges have been the most successful in their attempts, and from a combination of their *dicta* upon different occasions, we may arrive at a tolerably accurate definition in designating it " a residence " at a particular place, accompanied with positive or pre-

(*i*) *Putnam* v. *Johnson*, 10 *Massachusetts Reports*, p. 492; see also *Story's Conflict of Laws*, c. iii. s. 43.

(*j*) See below, chapter v., " Can a man have two domicils?"

(*k*) *Traité de la Personnalité et de la Réalité des Lois, Coutumes, Statuts, par forme d'Observations*, Obs. 32, p. 40.

(*l*) *Somerville* v. *Lord Somerville*, 5 *Vesey's Reports*, p. 750.

(*m*) See *Maltass* v. *Maltass*, 1 *Robertson's Eccles. Reports*, p. 73.

(*n*) *Donellus*, lib. xvii. c. xii. *Vide antè*, § xlv.

"sumptive proof of an intention to remain there for an unlimited time" (*o*). Domicil answers very much to the common meaning of our word "home;" and, where a person possessed two residences, the phrase, "he made the latter his home," would point out that to be his Domicil (*p*).

L. All jurists agree that there must be both intention and fact to constitute a domicil. The French jurists seem to have rather leant to the extreme doctrine of the Civil and Canon Law, that, without intention, no length of time can constitute a domicil, to which, I shall have occasion to show in another part of this Treatise, the law in England has been less inclined (*q*). It seems, however, to be

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(*o*) *Guier* v. *Daniel*, 1 *Binney's Pennsylv. Reports*, p. 349, note; "a residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time."

Elbers and Kraffts v. *United Ins. Company*, 16 *Johnson's Reports*, p. 128, "an indefinite intention of remaining."

The Frances, 8 *Cranch's Rep.* p. 363, "a permanent settlement for an indefinite time."

Johnson v. *Sundry Articles of Merchandise*, *Peter's Condensed Reports of Cases in the Supreme Court of the United States*, vol. iii. p. 171, "the time is not so essential as the intent."

(*p*) *Wolff*, *Jus Gentium*, c. i. s. 137, says, "domicilium dicitur habitatio aliquo in loco constituta perpetuo ibidem manendi animo—idiomate patrio dicitur *die Behausung*." This term, however, appears to have been superseded in the German of the present day by the words "*Wohnort*," and "*Wohnsitz*." The former word is used by *Savigny* in his last work, *System des Römischen Rechts*, v. s. 243 (319); the latter is said to be the correct expression, viii. s. 353 (58). [Cf. the *Dutch Civil Code*, tit. iv. art 74, Van woonplaats of domicilie. "Een ieder wordt geacht zijne woonplaats te hebben alwaar hij zijn hoofverblijf heeft gevestigt. Bij gebreke van zoodanige woonplaats, wordt de plaats des werkelijken verblijfs daarvoor gehouden."]

I find no trace of any Greek law on domicil. Cicero renders οἴκησις by domicilium. See the passage in Plato, Περὶ νόμων, xii. p. 206, translated by Cicero, *De Legibus*, lib. ii. c. xviii.

(*q*) "Domicilium, domus, sedes domestica, *habitatio certa et diuturna*," is the not inelegant definition of *Forcellini*, *Lexicon curâ Facciolati*. Some Etymologists derive *Domicilium* from "*domus*" and "*colo*." [Professor Skeat refers the latter portion of the word to *celare*, to hide.]

universally allowed by all jurists, that the fact is admitted only as a proof of the intention (*r*); but, then, there are certain facts which the law considers as undoubted evidence of that intention—facts which may be regarded as speaking a language on this point, at least equally entitled to belief with any declarations, oral or written, even of the person himself (*s*). This part of the subject will be discussed in considering the change of domicil, the criteria of which are nearly the same as those of its original existence (*t*).

(*r*) See *Locré, Législation Civile de la France*, tome iii. liv. i. t. iii. partie ii. p. 415.

(*s*) [*Doucet* v. *Geoghegan*, *L. R.* 9 Ch. Div. p. 441, A.D. 1878.]

(*t*) "Probatur mutatio eisdem ferè modis ac prima constitutio."—*Voet*, lib. v. t. i. s. 9.

CHAPTER V.

CAN A MAN HAVE TWO DOMICILS?

LI. CAN a man have two Domicils? is a question which should be resolved at an early stage of any disquisition upon this branch of law.

The Roman Law answered in the affirmative (*a*), that is, when a man had so set up his household gods in both places as to appear equally established in both: and this answer, properly understood and qualified, is not incorrect, with reference to the International Law of the present day (*b*).

LII. It is the remark of Domat (*c*), and of other jurists, that though it may be difficult, or impossible, for a man to have two domicils, which shall be equally the centre of his affairs, according to the definition already given; and though a man can have but one *principal* domicil, yet a man may have two or more domicils (*d*) for

(*a*) Though it was the boast of the Roman that he could not be the *civis* of another State: "Sed nos (Romani) non possumus et hujus esse civitatis et cujusvis præterea: cæteris omnibus concessum est."—*Cic. pro Balbo*, 12.

(*b*) "Viris prudentibus placuit duobus locis posse aliquem habere domicilium si utrubique ita se instruxit, ut non ideo minus apud alteros se collocâsse videatur."—*Dig.* lib. l. t. i. 6, § 2, *Ad Municip.*

(*c*) *Domat*, Droit public, liv. i. tit. xvi. s. iii. § 6.

Duranton, Cours de Droit Français, liv. i. tit. iii. ss. 357-359.

(*d*) "Mais on peut avoir deux domiciles, dit la demoiselle de Kerbabu, et n'est-ce pas ce qui a été jugé dans la succession du Prince de Guiméné, par l'arrêt du 6 Septembre, 1670? Ainsi le Comte d'Hautefort pouvoit être domicilié à Paris et à Hauterive. Deux responses font cesser une pareille objection. La première est *que si l'on pouvoit avoir deux domiciles, ce seroit par rapport à des objets tout différens*; ainsi l'un pourroit être un domicile de fait qui influeroit sur

different purposes. In the case of *Somerville* v. *Lord Somerville*, the Master of the Rolls observed on the novelty of the question, as being "between two acknowledged Domicils" (*e*), and upon the question, "which of two "Domicils shall preponderate, or, rather, which is the "Domicil according to which the personal estate shall be "regulated?" It cannot, therefore, be too carefully recollected, that Domicil is distinguished by the various situations to which it is applied (*f*); that is to say, the circumstances which will be of force to impress the character of a domicil in one instance, will fail to do so in another.

LIII. The European Law, and that of America require the characteristics of the *principal* (*g*) Domicil for cases of a testament, or distribution under intestacy.

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tout ce qui regarde directement la personne domiciliée; l'autre un domicile de droit et de volonté, qui décideroit du sort de la succession. Le cas est sans doute fort extraordinaire, et peut-être même que dans les règles il ne devroit point être admis," &c. *Cochin's* argument in the case of the Marquis d'Hautefort, *Œuvres*, tome I. p. 401.

(*e*) 5 *Vesey's Rep.* p. 750.

(*f*) *Kent's Commentaries on American Law*, Lecture 37, s. 4, note—"There is a *political*, a *civil*, and a *forensic* domicil."

(*g*) "Le domicile de tout Français, quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement."—*Code Civil*, t. iii. Du Domicil, art. 102. ["Il domicilio civile di una persona è nel luogo in cui essa ha la sede principale dei propri affari ed interessi. La residenza è nel luogo in cui la persona ha dimora abituale.'—*Codice Civile del Regno d'Italia*, tit. ii. art. 16.] "A man can have but one domicil for the purpose of succession."—*Kent's Comment.* Lect. 37, s. 4, note.

So *Grotius* (in his opinion cited by *Henry*) says, "To the solution "of this question, if we follow the written or Roman law and the com-"mentators thereon, 'originis domicilium est immutabile, et ideo qui "alibi habitat censetur habere duo domicilia.'—*Code*, lib. x. t. xxxviii. "De Municipibus et Originariis, 4 (Origine . . .). *Assumptio. ff. ad "Municip. et ibi Bart.* But this difficulty ceases if we consider the "general custom of the Netherlands, nay even of the whole world, at "this time: 'Secundum quam consuetudinem domicilium originis solâ "voluntate mutatur ita ut originarius nullo modo maneat subjectus "jurisdictioni originis: cui consuetudini testimonium etiam perhibet "*Gail*, lib. ii. obs. 36, dicens eam et in Germaniâ et ubique obtinere.'"

LIV. The facts and circumstances which might be deemed sufficient to establish a commercial domicil in time of war, and a matrimonial, or forensic, or political domicil, in time of peace, might be such as, according to English Law, would fail to establish a testamentary or Principal Domicil. "There is a wide difference," it was observed in a judgment delivered in a recent case before the Judicial Committee of the Privy Council, "in apply-"ing the Law of Domicil to contracts and to wills" (*h*).

LV. It might, perhaps, have been more correct to have limited the use of the term Domicil to that which was the *principal domicil*, and to have designated simply as *residences* the other kinds of domicil; but a contrary practice has prevailed, and the neglect (*i*) to distinguish

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This, says *Henry*, does not extend to cases of allegiance: *Odwin* v. *Forbes*, Appendix, p. 197; and in an opinion from a Dutch jurist, cited by the same author, occurs this passage: "Sed ista omnia ita non procedunt (cum locus originis det domicilii præsumptionem secundum ante dicta, pluribus tamen, puta tribus locis, quis domicilium habere possit) quin considerandum veniat an non et plurium domiciliorum jure frui quis possit. *Distinguenda vero hic sunt onera, munera, a successionis jure, de hoc modo quæritur hic.*"

So, too, *Voet:* "Considerandum tamen eos qui quantum ad successionem aliosque effectus domicilium per negotiationem, tabernam, nudam habitationem, non constituisse intelliguntur, nihilominus, quantum ad forum competens attinet, illis in locis dum illic degunt rectè conveniri;" &c. (lib. v. t. i. s. 98, De Judiciis, &c.). See too *Ferguson's Report of Consistorial Decisions in Scotland*, p. 283: "We indeed all know that, besides this permanent domicil, a man may have many domicils of action at the same time, &c. So the decisions known to the French law of the "Domicile du Secours," or pauper's domicil, "Domicile élu," a domicil chosen for the purposes of the execution of a particular act, and of the "domicile politique." See, too, the case of the Churchwarden—*Stephenson* v. *Langston*, 1 *Haggard's Consistory Reports*, p. 379.

(*h*) *Croker* v. *Marquis of Hertford*, 4 *Moore's P. C. Rep.* p. 339.

(*i*) See the *Discours* pronounced by *M. Malherbe* on the introduction of the Law of Domicil into the Code Civil: "Chaque individu ne peut avoir qu'un *domicile*, quoiqu'il puisse avoir plusieurs *résidences*." —*Locré, Législation de la France*, t. iii. p. 452.

"The gradation from *residence* to *domicil* consists both of circum-

between the different subjects to which the Law of Domicil is applicable, has been the chief source of the errors which have occasionally prevailed on this subject.

LVI. Thus, in a case (*j*) brought before the Prerogative Court of Canterbury in 1823, Sir John Nicholl expressed a doubt whether a British subject was entitled so far *exuere patriam*, as to select a foreign, in complete derogation of his British, domicil, which it was necessary he should do in order to render his property liable to distribution according to any foreign law: he considered this proposition as resting on no authority (*k*), and doubtful even upon principle (*l*). In a subsequent case, the same Judge held that there was no precedent for pronouncing that the property of a British subject, dying *intestate* in a foreign country in which he was domiciled, was distributable according to the law of that foreign country, or for holding that if such British subject be domiciled in a foreign country, he had not a right to make his will according to the law of the country of his *allegiance*, and not of his *domicil* (*m*).

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stances and intention;" see *Maltass* v. *Maltass*, 1 *Robertson's Eccles. Reports*, p. 75.

In the case of *Hogg* v. *Lashley*, the Lord Ordinary at first decided, "that there were two domicils at the dissolution of the marriage—one in London, the other in Scotland, but the last was the principal." The Court, however, altered the Interlocutor, and found that there was but one domicil in Scotland.—*Morrison's Decisions*, 4619; *Robertson on Personal Succession*, p. 142.

(*j*) *Curling* v. *Thornton*, 2 *Addams' Reports*, p. 19, and note to p. 15.

(*k*) *M. Fœlix* remarks: "En général les anciens auteurs ne parlent que du changement de *domicile*, en gardant le silence sur le changement de *nationalité*: c'est qu'alors les différentes provinces du même État étaient régies par des lois ou coutumes non uniformes, de manière que le simple changement de domicile plaçait l'individu sous l'empire d'une autre loi."—*Traité du Droit International Privé*, liv. i. tit. i. 28, note 2.

(*l*) *Stanley* v. *Bernes*, 3 *Haggard's Eccles. Rep.* p. 373.

(*m*) By 36 George III. cap. 52, sec. 2 [a section now repealed by the Statute Law Revision Act, 1872] a duty was payable "for every legacy, specific or pecuniary, given by any will of any person out of

LVII. These opinions of Sir John Nicholl, however, were overruled by the High Court of Delegates (*n*), and the distinction between the domicil of allegiance and the domicil for testamentary purposes was repeated and firmly established (*o*) in the case of *Croker* v. *Marquis of Hertford*.

LVIII. To these remarks may be added an extract from a judgment by Lord Stowell in the Admiralty Court, in which the true distinction is perspicuously taken.

It was a question as to the national character of the

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his personal or moveable estate, or out of or charged upon his real or heritable estate. Upon this Act some most important decisions have been given: it is only necessary to mention two:—1. *In re Ewin*, 1 *Crompton and Jervis's Exchequer Reports*, p. 151 (A.D. 1830), decided that *American*, *Austrian*, *French*, and *Russian* stock, the property of a testator *domiciled* in England, *was* liable to legacy duty.

2. *Thompson* v. *The Advocate-General*, 12 *Clark & Finnelly's* (*House of Lords*) *Reports*, p. 1, A.D. 1845, decided, overruling the Scotch Court of Exchequer, that legacy duty was *not* payable by the legatees named in the will of a British-born subject who had died *domiciled* in a British colony, though the personal property was locally situate in Scotland, to which the statute extended. In this case Lord Campbell said (p. 28), "My Lords, I believe that if the Chancellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised to hear that he was not to have his legacy duty on such a fund as this, where the testator was a British-born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicil, and had left property that actually was in England or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of Domicil has sprung up in this country very recently, and that neither the Legislature nor the judges thought much of it; but it is a very convenient doctrine: it is now well understood; and I think that it solves the difficulty with which this case was surrounded."

(*n*) A further distinction, taken in *Croker* v. *Marquis of Hertford*, 4 *Moore's P. C. Rep.* p. 339, as to the law of Domicil not applying to personal property which was deposited in *different* countries, was overruled both by the Prerogative Court and the Judicial Committee of the Privy Council. See remarks of Lord Chancellor on this point in *Bempde* v. *Johnstone*, 3 *Vesey's Reports*, p. 198.

(*o*) It was never the custom of the Judges Delegate to give reasons in open court for their decision; but in *Croker* v. *Marquis of Hertford*, Mr. Baron Parke declared that they had intended to lay down the rule broadly in *Stanley* v. *Bernes*.

claimant of a vessel seized in the river Thames by the Marshal of the Admiralty. Lord Stowell said—"The "question, therefore, comes to this, whether the claimant "is, *quoad* this property, to be considered as a *British* "subject. For some purposes he is undoubtedly so to be "considered; he is born in this country, and is subject to "all the obligations imposed upon him by his nativity. "He cannot shake off his allegiance to his native country, "or divest himself altogether of his *British* character, by "a voluntary transfer of himself to another country. "For the mere purposes of trade, he may, indeed, transfer "himself to another State, and may acquire a new national "character" (*p*).

This chapter should not be closed without mention of what has been considered, by high authority, the only possible case of two Principal Domicils, which would arise in modern times.

LIX. At the end of his judgment in *Somerville* v. *Lord Somerville*, the Master of the Rolls observed: "I shall "conclude with a few observations upon a question that "might arise; and which I often suggested to the Bar. "What would be the case upon two contemporary and "equal domicils, if ever there can be such a case? I "think such a case can hardly happen, but it is possible "to suppose it. A man, born no one knows where, or "having had a domicil that he has completely abandoned, "might acquire, in the same or different countries, two "domicils at the same instant, and occupy both under "exactly the same circumstances; both country houses, "for instance, bought at the same time. It can hardly "be said, that of which he took possession first is to "prevail. Then, suppose he should die at one, shall the "death have any effect? I think not, even in that case; "and then *ex necessitate rei*, the *lex loci rei sitæ* must pre-

(*p*) The *Ann*, *Dodson's Admiralty Reports*, p. 223; see also *Wheaton's Elements of International Law*, p. 159.

" vail; for the country in which the property is would not " let it go out of that, until they knew under what rule it " is to be distributed. If it was in this country, they " would not give it up until it was found that he had a " domicil somewhere."

LX. It appears that the case suggested by the Master of the Rolls had occurred in France. In 1680, a question arose as to the succession to the Prince de Guémené. The Prince appears to have left an equal amount of moveables at his residence in Paris, and at his residence on his estate, at Verger, in Anjou. It must be presumed (for the statement in Merlin is meagre) that, in other respects, an equal attachment to both places was manifested. It was decided that the custom of each place should regulate the succession to the goods found therein; in other words, that the *lex loci rei sitæ* should prevail (*q*).

(*q*) *Merlin, Rép. de Jurisp.* tome viii. Domicile, s. 8.

CHAPTER VI.

CAN A MAN BE WITHOUT A DOMICIL?

LXI. THE Roman law (*a*) answered this question by saying that it is difficult for anyone to be without a domicil. But even this might happen; if a person having abandoned his domicil, should make a journey by sea or land, seeking a place wherein to establish himself, he might be without a domicil. And Domat adopts this view of the case.

LXII. But a different view has been taken by other jurists (*b*), and especially by those of Great Britain and America. They hold that the former domicil is not abandoned until a new one has been intentionally and actually (*animo et facto*) acquired.

"A third rule I shall extract" (said the Master of the Rolls, in the case of *Somerville* v. *Lord Somerville*) "is, "that the Domicil of Origin is to prevail, until the party "has not only acquired another, but has manifested and "carried into execution an intention of abandoning his "former domicil, and taking another as his sole domi-"cil" (*c*).

A British-born subject had been employed as American

(*a*) "Et verum est habere, licet difficile est; quemadmodum difficile est, sine domicilio esse quemquam. Puto autem et hoc procedere posse, si quis domicilio relicto naviget vel iter faciat, quærens quo se conferat atque ubi constituat; nam hunc puto sine domicilio esse. [Domicilium autem habere potest et relegatus eo loci unde arcetur, ut Marcellus scribit.]"—*Dig.* lib. l. t. i. 27, §§ 2, 3.

(*b*) *Duranton*, liv. i. t. cxi. s. 360; *Story's Conflict of Laws*, ch. iii.; National Domicil, s. 47.

(*c*) 5 *Vesey's Rep.* p. 787.

consul at the Cape of Good Hope (*d*), and was engaged in a house of trade there. A ship belonging to him was taken by a British cruiser, on her voyage from the Cape to Europe. It was contended that he was not a Dutch merchant, as he had intended to remove to America; but Lord Stowell said—"A mere intention to remove has "never been held sufficient without some overt act; being "merely an intention, residing secretly and undistinguish- "ably in the breast of the party, and liable to be revoked "every hour. The expressions of the letter in which this "intention is said to be found are, I observe, very weak "and general, of an intention merely *in futuro*. Were "they even much stronger than they are, they would not "be sufficient; something more than mere verbal decla- "tion, some solid fact, showing that the party is in the "act of withdrawing, has always been held necessary in "such cases" (*dd*).

LXIII. The Original Domicil and the native character easily revert (*e*); and, therefore, it has been laid down by the American (*f*) Judges, that a person resumes his native character as soon as he puts himself *in itinere* to return to his native country; or, as Lord Stowell said of a belligerent, lurking under the disguise of a neutral, "the "sin of his old character is revived" (*g*).

And so in *Munroe* v. *Douglas* (*h*), it was said by the

(*d*) [The Cape of Good Hope was at that time in the hands of the Dutch.]

(*dd*) The *President*, 5 *C. Rob. Adm. Rep.* p. 279. See, also, the *Falcon*, 6 *ib.* p. 198.

(*e*) *La Virginie*, 5 *ib.* p. 99.

(*f*) This national character, which a man acquires by residence, may be thrown off at pleasure by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. It is an adventitious character gained by residence, and which ceases by non-residence; it no longer adheres to the party from the moment he puts himself in motion *bonâ fide* to quit the country, *sine animo revertendi*.—The *Venus*, 8 *Cranch's* (*Amer.*) *Rep.* p. 280. See, also, the *St. Lawrence*, 1 *Gallison's* (*Amer.*) *Rep.* p. 467.

(*g*) The *Phœnix*, 3 *C. Rob. Adm. Rep.* p. 191.

(*h*) 5 *Maddock's Chancery Reports*, p. 405.

English Vice-Chancellor, that an acquired domicil "re- "mains until a subsequent domicil be acquired, unless the "party die *in itinere* (*i*) towards an intended Domicil." And in *Colville* v. *Lauder* it was *observed*, on the Scotch Bench, that when the deceased (a native of Scotland) was at St. Vincent's, his succession must have been regulated by the law of England; but after leaving that island, he must, in the whole circumstances, be considered as *in transitu* to Scotland (*k*).

LXIV (*l*). A vagabond is said to be a person who, without travelling in quest of a domicil, has really and truly no certain domicil at all.

LXV. A familiar example occurs in the instance of Gipsies. In one of the cases recorded in Cochin, it appears that it was attempted to include a "comédien," a travelling player, under this class. Cochin, however, combatted

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(*i*) *Pothier* seems to think that the change is not effectual till the actual arrival at the new place: "La volonté de transférer notre domicile dans un autre lieu doit être justifiée. Elle n'est pas équivoque lorsque c'est un bénéfice, une charge ou un autre emploi non amovible qui nous y appelle. En ce cas, *dès que nous y sommes arrivés nous y acquérons domicile et nous perdons l'ancien.*"—*Introd. Gén. aux Cout* 13.

(*k*) *Morrison's Succession*, App. i.; see this case below. *Craigie* v. *Lewin*, 3 *Curteis' Ecclesiastical Reports*, p. 445.

(*l*) *Domat*, liv. i. t. xvi. s. 9. So it was argued in the *Duke of Guise's* case, that, being exiled from France, he had no domicil where he served as a general; he would be a *vagabond*—which *D'Aguesseau* pronounced *absurdum*. See *Vattel*, liv. i. c. xix. s. 219, *Des Vagabonds*: "Les *Vagabonds* sont des gens sans domicile. Par conséquent ceux qui naissent de parents vagabonds n'ont point de patrie: puisque la patrie d'un homme est le lieu où, au temps de sa naissance, ses parents avaient leur domicile, ou l'État dont son père était membre alors, ce qui revient à la même chose: car s'établir pour toujours chez une nation, c'est en devenir membre, au moins comme habitant perpétuel, si ce n'est point avec tous les droits des citoyens. Cependant on peut regarder la patrie d'un vagabond comme celle de son enfant, en tant que ce vagabond sera censé n'avoir pas absolument renoncé à son domicile naturel ou d'origine." This is little more than a repetition of *Wolff's* language, *Jus Gentium*, c. i. s. 245.

this doctrine, declaring that every man was born with a domicil, and that till he had acquired another *animo permanendi*, it would remain till his death (*m*).

LXVI. In the leading American case of *Guier* v. *O'Daniel* it was contended, among other things, that Thomas Guier, being a seafaring man, a sort of vagabond on the ocean, was without a domicil; but the Court held that his Domicil of Origin remained (*n*).

The rule is laid down by one of the latest writers upon Private International Law, that children of unknown parents must be considered as domiciled in the territory where they actually are: this is said to be a rule generally acknowledged and received (*o*).

(*m*) *Cochin*, *Œuvres*, tome i. p. 20, pour Dame Louise Françoise de Samsons.

Carpzovius says, "Vagabundum nuncupamus eum qui nullibi domicilium contraxit habitationis, ita ut nec forum sortiatur certum, originis verò domicilium si quis usque velit, parum efficiet si vagabundus ibidem non reperiatur, licet nec inficias eamus conveniri ipsum posse in domicilio naturali modo, copia ejus haberi queat, vel ex hoc ipso generali asserto: Vagabundum ubique conveniri, nec utitur exceptione incompetentiæ, qui est vagabundus" (tit. iii. art. i. s. 65; *Processus Juris*, &c.).

(*n*) *Guier* v. *O'Daniel*, 1 *Binney's* (*Pennsylv.*) *Reports*, p. 349, note; *vide antè*.

(*o*) *Traité du Droit International Privé*, &c., par *M. Fœlix*, liv. i. t. i. s. 28, note 1.

CHAPTER VII.

DIFFERENT KINDS OF DOMICIL.

LXVII. THE kinds of Domicil are sometimes classed as follows:—1. The Domicil of Birth (*Domicilium naturale*). 2. The Domicil by Operation of Law (*necessarium*). 3. The Domicil of Choice, where one is abandoned and another acquired (*Voluntarium, adscititium—Domicile de Choix*) (*a*).

LXVIII. The Civilians generally use the expression Domicil of Origin (*domicilium originis*) as synonymous with Domicil of Birth (*domicilium nativitatis*). Though if the parents were on a journey, or temporarily absent from their own domicil, that, and not the accidental place of birth, was the domicil of the child. "The Domicil of Origin "is that arising from a man's birth and connections," according to the case of *Somerville* v. *Lord Somerville* (*b*).

(*a*) *Wolff*, c. i. s. 138, *Jus Gentium*; *Vattel*, liv. i. c. xix. s. 218; *Pothier, Introd. Gén. aux Cout.* s. 12.

(*b*) "Exemplo senatorii ordinis patris originem unusquisque sequatur."—*Code*, lib. x. t. xxxi. 36.

"Est autem originis locus in quo quis natus est, *aut nasci debuit*. Licet forte re ipsâ alibi natus esset, matre in peregrinatione parturiente."—*J. Voet*, lib. v. t. i. s. 91.

According to the law of England, even the children of aliens not at enmity with the Crown, if *born within the realm*, are natural-born subjects; and all children, whose fathers or grandfathers by the father's side were natural-born subjects, are, with certain exceptions, deemed natural-born subjects themselves.—*Stephen's Commentaries*, vol. ii. book iv. part i. chap. ii. For the 33 Vic. c. 14, "An Act to amend the law relating to the legal condition of aliens and British subjects," and 35 & 36 Vic. c. 39, see vol. i. p. 653, Appendix v.; *Cutler's Law of Naturalization*, 1871. See also *Kent's Commentaries*,

LXIX. But this expression "Domicil of Origin" is incorrect, and tends to confound the distinct ideas of "Origin" and "Domicil." There is a time, indeed, when they happen to be identical; for instance, a child born in the State in which his father is domiciled has, generally speaking, his Origin and his Domicil in that State: because, in the case of a person who has never *acquired* a domicil, you must go back to the epoch when a domicil was chosen for him;—this epoch is the time of his birth.

This is the true meaning of "Origo," to which jurists have referred when they have spoken of the *forum originis*; though they have sometimes confounded *Origin* with the accidental *place* of *birth*, and sometimes have not had a clear idea of the relation which modern *Origin* bears to the Roman *Origo* (*c*).

Savigny explains the matter in this way:—

The Romans called by the name *Origo* the right of citizenship which a man acquired by his birth. The moderns call by the name of *Origo* the fiction that a man has a *Domicil* in the place at which his parents at the time of his birth had a domicil. This notion of *Origo* in modern law is equally applicable to the jurisdiction (*d*) as *forum originis*, and to the local law which attaches to the person, or *lex originis* (*e*).

The expression, therefore, *domicilium originis* is, with reference to the language of the Roman Law, unintelligible, and confounds two distinct and independent ideas; while, with reference to modern law, it signifies a *domicil* not founded upon choice, but upon descent from a parent, and therefore in some sort upon a fiction.

LXX. The effect of origin, as an ingredient in the

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vol. ii. Lecture 25; *Somerville* v. *Lord Somerville*, 5 *Vesey's Reports*, p. 750; *Traité du Droit International Privé, &c., par M. Fœlix* (Paris, 1856), liv. i. t. i. s. 28.

(*c*) *Savigny, R. R.* viii. ss. 350-359.

(*d*) *Ib.* viii. s. 369 (103).

(*e*) *Ib.* viii. s. 459 (103).

consideration of the circumstances which constitute a change of domicil, will be discussed in a later chapter in which the "Domicil of Choice" finds its place.

LXXI. *Domicil by operation of Law* comprises two classes of persons: 1. Those who are under the control of another, and to whom the State gives the Domicil of another. 2. Those on whom the State affixes a Domicil—(i.) By virtue of the employment or office they hold; (ii.) By virtue of some punishment inflicted upon them.

LXXII. Under the first class may be reckoned the Domicil of—1. The Wife. 2. The Minor (i.) legitimate, and (ii.) illegitimate. 3. The Student. 4. The Lunatic. 5. The Servant.

Under the latter class may be reckoned—1. The Officer employed by the State, whether Civil or Military. 2. The Ecclesiastic. 3. The Prisoner. 4. The Exile. 5. The Emigrant.

[The Domicil of a Corporation will also have to be considered.]

CHAPTER VIII.

I. NECESSARY DOMICIL—WIFE.

LXXIII. We have now to consider the case of those persons who are comprised under the first class, the domicil of whom is determined by operation of Law.

LXXIV. First of the Wife (*a*).

The maxim of the Roman (*b*) and of Continental civilians, and of this country and of America, is, that, as the wife takes the rank, so does she the domicil, of her husband; and the widow retains it, by the same analogy (*c*), after the death of her husband. If, however, the widow marry again, her domicil will be that of her second husband; and, according to the Canon law, she had a right to be buried in the place of sepulture belonging (*d*) to the domicil of her last husband.

(*a*) *Disabilities of American Women married abroad, by W. H. Lawrence*, New York, 1871.

As to the national *status* of married women according to the present law of England (33 Vic. c. 14 and 35 & 36 Vic. c. 39), see vol. i. p. 653, Appendix.

(*b*) "Item rescripserunt mulierem quamdiù nupta est incolam ejusdem civitatis videri cujus maritus ejus est, et ibi unde originem trahit non cogi muneribus fungi."—*Dig.* lib. l. t. i. 38. "Mulieres honore maritorum erigimus, genere nobilitamus, et forum ex eorum personâ statuimus; et domicilia mutamus."—*Code*, lib. xii. t. i. 13.

(*c*) "Vidua mulier amissi mariti domicilium retinet, exemplo clarissimæ personæ per maritum factæ. Sed utrumque aliis intervenientibus nuptiis permutatur."—*Dig.* lib. l. t. i. 22. "Sin autem minoris ordinis virum postea sortitæ fuerint, priore dignitate privatæ, posterioris mariti sequentur conditionem et domicilium."—*Code*, lib. x. t. xxxix. 9.

(*d*) "Mulier autem quæ plures viros habuit successivè, si sepul-

LXXVI. This doctrine of the widow's title to the domicil of her husband was successfully sustained by one of our most eminent civilians against the lawyers of France, in the question of the disputed succession to the personal property of Henrietta Maria, widow of Charles the First.

LXXVII. The French lawyers claimed the property for the Duchess of Anjou (*e*), her daughter, alleging that Charles the Second, the Duke of York, and the Princess of Orange (the other children), were excluded and disabled by the "*droit d'aubaine*," which took effect because Henrietta Maria had died domiciled in France.

They reasoned in this manner: that the Dowager Queen of England was a Frenchwoman, the daughter of Henry the Fourth, from whom she had received a "*dot*" of one hundred thousand crowns; that having fled from England in 1645, she purchased a house in France, and lived there for twenty-five years, till the time of her death, visiting England only twice during that period, and dying in her French residence; that she was, therefore, a domiciled native of France; and that the acknowledged rule of "mobilia sequuntur personam" must be applied to the question of succession to her personal property.

LXXVIII. It was argued, on the other side, by Sir Leoline Jenkins, that it was a clear proposition of public law that the wife followed the domicil of her husband; that she always continued to do so; and that no length of absence from her husband could affect this right; that the Queen Dowager of England originally went to France in obedience to the order of her husband, at the time when England was embroiled in civil war; that she afterwards resided there for the sake of her health, having

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turam non eligat, est cum viro ultimo, cujus domicilium retinet et honorem tumulanda."—*Decretal.* lib. iii. t. xii. c. iii.

(*e*) Better known in our history as Duchess of Orleans.

returned to France for the purpose of attending the marriage of her daughter to the Duke of Anjou; that she had always herself considered England as her domicil; that there she had a palace (Somerset House), moveables, and officers, who received their wages there; that during her absence she had laid out considerable sums in the reparation of Somerset House; that her letters to her son, Charles the Second, demonstrated that ill health alone prevented her from closing her life in London; and, lastly, that it did not become France, which held that all the great nobles of the kingdom and officers of the Crown were domiciled at Paris, the metropolis of the realm, to deny the application of the same principle to the Queen Mother of England, and to refuse to consider her as an integral part of the Royal Family of that Kingdom.

LXXIX. The reasoning of Sir L. Jenkins prevailed. It is obvious that the main argument is founded upon the widow's retention of the marital domicil: the point of her residence in France, having been for the most part that of an exile and compulsory, does not seem to have been much pressed, though it is glanced at; but her latter residence is said to have been under the constraint of ill health (doit être estimée fortuite, passagère, et mesme contrainte par son indisposition) (*f*).

LXXX. The betrothed, though in many respects enjoying the privileges of the wife, according to the Roman and Continental law, remained, in respect to her domicil, as before her betrothment (*g*).

LXXXI. I am not aware of any decided case in Eng-

(*f*) *Wynne's Life of Sir Leoline Jenkins*, vol. i. p. 19; vol. ii. pp. 665-70. Both the statement of the French lawyers and Sir Leoline's reply are in the French language.

(*g*) "Ea quæ desponsa est ante contractas nuptias suum non mutat domicilium."—*Dig.* lib. l. t. i. 32. And *J. Voet* observes: "Quamvis multis in partibus juris nostri sponsa uxoris loco sit, veluti in injuriis, dotis privilegio, dotali fundo aliisque, domicilii tamen intuitu contra est; cum desponsata ante contractas nuptias suum domicilium non mutat."—lib. v. t. i. s. 92. *Wharton's Conflict of Laws*, s. 43.

land upon the question of the domicil of a wife divorced *a mensâ et thoro*; but on principle it seems to me that there can be little doubt that in England, as in France, it would not be that of her husband, but the one chosen for herself after the divorce (*h*).

Voluntary separations have not been holden to give the wife the right of choosing a domicil in proceedings for a divorce.

LXXXII. There is another exception to the general rule mentioned by French jurists; namely, that where the husband is under an interdict (*interdit*), or an idiot, or a madman (*i*), and the wife is appointed his guardian

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(*h*) See, however, *Dolphin* v. *Robins*, 7 *H. L. C.* p. 390; s.c. 3 *Macqueen, H. L. C.* p. 563, in which Lord Kingsdown seems to have entertained some doubt on the subject.

"Le domicile d'une personne est aussi celui de sa femme. Comme la femme dès l'instant de la célébration du mariage passe sous la puissance de son mari, elle cesse en quelque façon d'avoir *propriam personam*, et elle ne fait plus qu'une même personne avec son mari. Elle prend, dès cet instant, son domicile, celui de son mari devient le sien, et elle devient, dès ce jour, sujette aux statuts personnels du lieu de ce domicile, quoiqu'elle n'y soit pas encore arrivée. Ceci n'est pas contraire à ce qui sera dit ci-après, que la translation de domicile d'un lieu à un autre ne peut s'effectuer que lorsqu'on y est arrivé; car ce principe a lieu à l'égard du domicile propre qu'une personne se propose d'établir, et non à l'égard de ce domicile que la femme ne s'établit pas elle-même, mais qu'elle tient de son mari. Lorsqu'une femme est séparée d'habitation par un jugement, qui n'est suspendu par aucun appel ni opposition, elle peut s'établir un domicile qui lui devient propre." (This is the language of *Pothier's Introd. aux Coutumes*, p. 4.) According to the existing French Code, tit. iii. art. 108—"La femme mariée n'a point d'autre domicile que celui de son mari.'

M. Marcadé observes, in his recent *Commentary upon the French Codes* (last edition, vol. i. p. 287), "Il y a cependant une exception à la disposition de notre article, pour la femme séparée de corps. Celle-ci en effet étant formellement autorisée par le jugement de séparation à habiter séparément de son mari, la doctrine et la jurisprudence, dans le silence de la loi, ont établi qu'elle recouvrait, par là, le droit de se choisir un domicile propre; c'était aussi là, sous l'ancienne législation, le sentiment de Pothier."

(*i*) "Il est même un cas particulier" (says the same author) "où la femme mariée peut avoir son domicile propre, sans être séparée de

(*tutrice*), she may choose her own domicil; and so, according to the same law, where the husband is transported, or condemned to an infamous punishment; as would also, probably, be the case in England.

LXXXIII. The French Courts have most justly decided that the wife *legally separated* from her husband may choose her own domicil: "Considérant que, par la séparation de corps, la femme a été déliée de l'obligation d'habiter avec son mari, qu'il est évident qu'elle recouvre le droit de choisir un autre domicile où elle puisse transporter son établissement et le siège de ses affaires" (*k*).

LXXXIV. In the English Courts there have been decisions bearing upon the question of the domicil of the wife when *living apart*, but not *legally separated*, from her husband.

A married woman had power to appoint a fund by writing under her hand or by will. For thirty years previous to, and up to the time of her death, she resided in Paris separate from her husband; but there was no legal divorce or separation. Her husband was domiciled

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corps: c'est quand le mari est interdit, et que sa femme est nommée sa tutrice. L'interdit, en effet, aux termes de notre article, ne peut avoir de domicile propre, il est domicilié chez son tuteur. Le mari donc, dans notre hypothèse, sera domicilié chez sa femme."

Cochin, in his argument on the *Duchess of Holstein's* case, observes, "Qu'elle n'en pouvoit avoir d'autre que celui de son mari; mais depuis que par la séparation elle est devenue maîtresse du choix de son domicile, elle l'a fixé à Trelon," &c.—*Œuvres*, tome viii. p. 12.

The Sardinian Code allowed, by implication, the wife, divorced *à mensâ et thoro*, to choose her own domicil. "La donna maritata non ha altro domicilio che quello del marito, salvo che ne sia legittimamente separata di corpo e d'abitazione."—*Codice Civile*, tit. iii. s. 71. The modern Italian Code is to the same effect: "La moglie che non sia legalmente separata ha il domicilio del marito; [divenendo vedova lo conserva, finchè non ne abbia acquistato un altro." (Art. 18.) Cf. the *Dutch Civil Code*, tit. iv. art. 78: "Eene getrouwde vrouw, welke niet van tafel, bed, bijwoning en goederen is gescheiden, heeft geene andere woonplats dan die van haren man."]

(*k*) *Arrêt du* 23 *Novembre*, 1848; *Dalloz Ann.* 1849, ii. 9. *Rogron's Code N. expliqué*, i. 194-5.

in England. She disposed of the fund by testamentary paper, valid according to the Law of France, but not witnessed so as to be valid in this country. The English Courts held that it was not a good execution of the power, either as a will or as a writing under her hand (*l*).

LXXXV. In the case of *Donnegal* v. *Donnegal* (*m*), it was said that a party may have two domicils, the one actual, and the other legal; and *primâ facie*, at least, the husband's actual and the wife's legal domicil are one, wheresoever the wife may be personally resident; and the residence of the husband in London was held to found the jurisdiction of the Consistory of London over the wife, who was resident in Ireland.

LXXXVA. So in *Shackell* v. *Shackell* (*n*), a case in the Arches Court of Canterbury, the husband, who resided at Egham, cited the wife, who resided at Paris, in the Court of Arches, on the legal presumption that she was resident within the same jurisdiction as her husband.

LXXXVI. But the leading case is that of *Warrender* v. *Warrender*, in which the decision of the Scotch Court was affirmed on appeal to the House of Lords. The facts of this case, so far as they are important in their bearing upon this point, may be given in the words of the judgment delivered by Lord Brougham :—

"Sir George Warrender, a Scotch Baronet, possessed "of large hereditary estates in Scotland, born and edu- "cated in that country, and having there his capital "mansion, where he resided the greater part of the year, "except when he held office, or was attending his "parliamentary duties in England, intermarried, in "London, in 1810, with the daughter of the Viscount "Falmouth, Ann Boscawen, who was born and educated "in England, and never had been in Scotland previous to

(*l*) *In re Daly's Settlement* (A.D. 1858), 25 *Beavan's Rep.* p. 456.
(*m*) 1 *Addams' Ecclesiastical Reports*, pp. 5, 19.
(*n*) Cited by the Judge in *Whitcombe* v. *Whitcombe*, 2 *Curteis' Eccles. Reports*, p. 352.

" the marriage. After that event she was twice there " with her husband; but, subsequently, he resided for the " most part in London, to discharge the duties of Lord " of the Admiralty and Commissioner of East India " Affairs, offices which he held from 1812 to 1819 inclusive. " In the latter year, at the end of much domestic dissen- " sion, a separation was determined upon, and an agree- " ment executed by the parties, in which, after setting " forth, by way of recital only, their having agreed to live " separate, Sir George bound himself to allow Dame Anne " Warrender a certain annuity; and it was further agreed, " that the agreement shall only be rescinded by common " consent, and in a certain specified manner. A letter " was written by Sir George, bearing equal date with the " agreement, and addressed to the trustees under the " marriage settlement. In this he stated, that he had " refused to insert any provision for her being allowed to " live apart, in order that he might not be precluded from " suing, if he chose, for restitution of conjugal rights; but " also stating, that it was not his intention ever to do so, " or to interfere with or molest her in the choice of a resi- " dence. The marriage settlement had secured her a " jointure upon the Scotch real estates; upon which fact " it is now admitted that nothing can turn, except that it " may serve the better to show the connection of the " parties, and the contract, with Scotland. These are the " facts, and the undisputed facts of this case; I say un- " disputed—for the attempts occasionally made in the " course of the Appellant's arguments to create some " doubts as to Sir George Warrender's Scotch residence " and domicil, cannot be considered as persisted in with " such a degree of firmness or uniformity, as to require a " discussion and a decision of the point, in order to clear " the way for the very important legal question which " arises upon these plain and undeniable statements. In " 1834, after the parties had lived separate for fifteen " years, Sir George's residence being, during the latter

" part of the time, almost constantly on his Scotch estates, " and Lady Warrender's varying from one country to " another—a few months in England, generally in France, " and occasionally in Italy—Sir George brought his suit " in the Court of Session (exercising under the recent " statute the consistorial jurisdiction formerly vested in " the Commissioners) for divorce, by reason of adultery, " alleged to have been committed by his wife. Lady " Warrender took preliminary objections to the competency " of the suit under three heads:—First, that the summons " of divorce was not served on her at her husband's resi- " dence, so as to give her a regular citation. Secondly, " that the Court had no jurisdiction, inasmuch as the " wife's domicil was no longer her husband's after the " separation. Thirdly, that even if the service had been " regular, and the two domicils one and the same, and " that domicil Scotland, the marriage having been con- " tracted in England, and one of the parties being English, " no sentence of a Scotch Court could dissolve the contract. " To these several points I propose to address myself in " their order.

" The first need not detain us long. It is clear that if " the wife's domicil is not in Scotland, her being cited or " not cited at the mansion is wholly immaterial, and the " minor objection of irregularity merges in the exception " to the jurisdiction; and if the wife's domicil was in " Scotland, it must be her husband's, which, indeed, the " objection supposes: and then the argument amounts to " this, that Sir George should have served himself with a " notice, by way of regularly serving his wife."

After further discussing this objection, he proceeded:— " We may, therefore, come at once to the serious and " more substantial exceptions taken against the jurisdic- " tion; the first of which arises from the domicil, as " affected by the articles of separation. Secondly, it is " admitted on all hands that, in the ordinary case, the " husband's domicil is that of the wife also; that, con-

" sequently, had Lady Warrender been either residing " really and in fact with her husband, or been accidentally " absent for any length of time, or even been by some " family arrangement, without more, in the habit of never " going to Scotland, which was not her native country, " while he lived generally there, no question could have " been raised upon the competency of the action, as ex- " cluded by her non-residence. For actual residence— " residence, in point of fact—signifies nothing in the case " of a married woman, and shall not, in ordinary circum- " stances, be set up against the presumption of law that " she resides with her husband. Had she been absent for " her health, or in attendance upon a sick relation, or for " economical reasons, how long soever this separation *de* " *facto* might have lasted, her domicil would never have " been changed. Nay, had the parties lived in different " places, from a mutual understanding which prevailed " between them, the case would still be the same. The " law could take no notice of the fact, but must proceed " upon its own conclusive presumption, and hold her domi- " ciled where she ought to be, and where, in all ordinary " circumstances, she would be—with her husband. Does " the execution of a formal instrument, recognizing such " an understanding, make any difference in this case? " This is all we have here; for there is no agreement to " live separate. The 'letter' has, indeed, been imported " into the agreement, and argued upon as a part of it. " Now, not to mention that the instrument in which par- " ties finally state their intentions, and mutually stipulate " and bind themselves, is always to be regarded as their " only contract, and that no separate or subsequent agree- " ment is to be taken into the account, unless it contains " some collateral agreements—admitting that we have a " right to look at the letter at all, either as part of one " transaction with the agreement, or as providing for " something left unsettled in the principal instrument, and " so collateral in some sort to the instrument itself, it does

" not appear that the tenor of the letter aids the Appellant's " contention."

After dwelling further upon this point, Lord Brougham proceeded—

" But let us suppose it to be an ordinary deed of sepa- " ration; that it contained a covenant on the husband's " part to permit the wife to live apart from him, and to " choose her own residence; and let us consider what " difference this would make, and whether or not this " would be sufficient to determine the legal presumption " of domicil.

" First of all, it must be admitted, that, even if the " execution of such a deed gave the wife a power of choos- " ing a residence, no new domicil could be acquired by her. " The domicil which she had before marriage was for ever " destroyed by that change in her condition. The disso- " lution of the marriage by divorce, or by the husband's " decease, never could reunite her to her original or maiden " domicil; much less would this be effected by any such " deed as we are supposing; for that, by the utmost possible " stretch of the supposition, could only give her the option " of taking a new domicil other than her husband's; and " until she did exercise this option, her married or marital " domicil would not be changed. Now, there is no evidence " here of Lady Warrender having ever acquired any domicil " after 1819, or other than the one she had before the " separation, that is to say, her husband's; and this proof " clearly lay upon her, for she sets up the separation, only " conveying to her a power of choosing a domicil, and the " production of the articles only proving that power to " have been conferred upon her: unless she goes further, " and also proves the exercise of the powers by acquiring " a new domicil, she proves nothing. She only shows— " and all the ample admissions we are, for the sake of " argument, making, confess—that she had obtained the " power or possibility of gaining a domicil other than her " husband's, but not at all that she had actually gained

" such a separate domicil. The evidence in the cause is " nothing to this purpose. It is, indeed, rather against " than for the Appellant's argument; it rather shows that " she had done nothing like gaining a new domicil; for " she was living chiefly abroad, and in different places: " but there is, at any rate, no evidence in the cause of her " acquiring a separate domicil; and, the proof lying upon " her, it follows that, for all the purposes of the present " question, her husband's Scotch domicil is her own: but " suppose we pass over this fundamental difficulty in her " case, and which appears to me decisive of the exception " with which I am now dealing, I am of opinion there is " nothing in the separation, supposing it had been ever so " formal and ever so full in its provisions, which can by " law displace the presumption of domicil raised by the " marriage, and subsisting in full force as long as the " marriage endures" (*o*).

LXXXVII. And in accordance with the rule laid down in this decision, in the case of *Whitcombe* v. *Whitcombe*, the Judge of the Consistory of London pronounced the wife in contempt, for the purpose of carrying on the proceedings of the suit, in which the husband, living in the Diocese of London, had served a citation upon the wife, who was resident in the Diocese of Hereford (*p*).

(*o*) 2 *Clark & Finnelly's Rep.* p. 520. See *Dolphin* v. *Robins*, 7 *H. L. C.* p. 390; s.c. 3 *Macq. H. L. C.* p. 563.

(*p*) 2 *Curteis' Eccl. Rep.* p. 351. The citation was by Letters of Request to the Consistory of Hereford; but the principle is the same. The effect of the Matrimonial Domicil (not the place of the marriage) upon instruments of dower, rights of wife and children, is among the gravest and the most difficult questions belonging to the Conflict of Laws. According to the Roman Law—"Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est; nec enim id genus contractûs est, ut et eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cujus domicilium et ipsa mulier per conditionem matrimonii erat reditura."—*Dig.* lib. v. t. i. 65. See this doctrine upholden in the case mentioned by *Pufendorf*, *Universi Juris Observationes*, cxxi.

See also the case of *Gambier* v. *Gambier*, 7 *Simons' Chancery*

LXXXVIII. But this rule, that the domicil of the husband is the domicil of the wife, is not to be pressed so as to make a fiction of law work a practical injustice.

In a case where an Englishman, being in embarrassed circumstances, for the purpose of avoiding his creditors, left England and went to Scotland in 1854, leaving his wife behind him, and in 1858 became the lessee of a shooting lodge for the term of six years, and had from time to time corresponded with his solicitors in London, with the view of making arrangements with his creditors, and in 1860 commenced a suit for a divorce against his wife on the ground of adultery, it was holden that the domicil of origin was not changed, and that therefore the Scotch Courts had no jurisdiction to entertain the suit (*q*).

This rule does not apply to a suit brought by the wife against the husband who has illegally separated himself from her.

The language of the Court of Massachusetts, in *Harteau* v. *Harteau*, is as follows (*r*):—

"This suggests another source of inquiry, that is, how "far the maxim is applicable to this case, 'that the "'domicil of the wife follows that of the husband.' Can "this maxim be true in its application to this subject,

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Reports, 263, and the two most important cases of *Hogg* v. *Lashley*, in the House of Lords, 6 *Brown's Parliamentary Cases*, 550, and *Saul* v. *His Creditors*, in the American Courts, *antè*, § viii. n. (*f*). The former established, that parties married in England, where they had their domicil, by removing to Scotland, and fixing their domicil in that country, changed their own rights and the rights of their children, and subjected these to the rules of succession of the law of Scotland. The latter decided, that where married persons had removed from Virginia, their matrimonial domicil, where no community exists, into Louisiana, where a community does exist, the acquests and gains, *acquired after their removal*, were to be governed by the laws of community in Louisiana.—*Story's Commentaries*, p. 153; *Robertson on Personal Succession*, pp. 142, 147, and note.

(*q*) *Pitt* v. *Pitt*, 4 *Macq. H. L. Cases*, p. 627; 10 *Jur. N. S.* p. 735. Lord Kingsdown *diss.*

(*r*) 14 *Pickering's* (*Amer.*) *Rep.* p. 181 (A.D. 1833).

" where the wife claims to act, and by law, to a certain " extent, and in certain cases, is allowed to act, adversely " to her husband? It would oust the Court of its juris- " diction in all cases where the husband should change " his domicil to another State before the suit is instituted.

" It is in the power of the husband to change and fix " his domicil at his will. If the maxim could apply, a man " might go from this country to Providence, take a house, " live in open adultery, abandoning his wife altogether, " and yet she could not libel for a divorce in this State, " where, till such change of domicil, they had always " lived. He clearly lives in Rhode Island: her domicil, " according to the maxim, follows his; she therefore, in " contemplation of law, is domiciled there too; so that " neither of *the parties* can be said to *live* in this Common- " wealth.

" It is probably a juster view to consider that the " maxim is founded upon the theoretic identity of person " and of interest between husband and wife, as established " by law, and the presumption that, from the nature of " that relation, the home of the one is that of the other, " and intended to promote, strengthen, and secure their " interests in this relation, as it ordinarily exists where " union and harmony prevail. But the law will recognize " a wife as *having* a separate existence, and separate " interests, and separate rights, in those cases where the " express object of all proceedings is to show that the " relation itself ought to be dissolved, or so modified as " to establish separate interests, and especially a separate " domicil and home, bed and board being put, a part for " the whole, as expressive of the idea of *home*. Otherwise, " the parties in this respect would stand upon very unequal " grounds, it being in the power of the husband to change " his domicil at will, but not in that of the wife.

" The husband might deprive the wife of the means of " *enforcing* her rights, and, in effect, of the rights them- " selves, and of the protection of the Commonwealth at

" the same time that his own misconduct gives her a right " to be rescued from his power on account of *his own* " misconduct towards her " (*s*).

(*s*) See *Dean* v. *Richmond*, 5 *Pickering's* (*Amer.*) *Rep.* p. 461; *Barber* v. *Root*, 10 *Mass. Rep.* p. 260.

See, too, in Supreme Court of U. S., *Cheever* v. *Wilson*, 9 *Wallace*, 107; principle carried further, *Wharton*, s. 225; *Yelverton* v. *Yelverton*, 1 *Swabey & Tr.* p. 585.

As to the national *status* of English married women (33 Vic. c. 14; and 35 & 36 Vic. c. 39), *vide post*, ch. xvii. and vol. i. App. p. 653.

CHAPTER IX.

II. NECESSARY DOMICIL—MINOR.

LXXXIX. THE Minor may be either—1. Legitimate, or 2. Illegitimate. The Legitimate may be either, 1, emancipated, or 2, unemancipated (*a*).

XC. The Domicil of the legitimate unemancipated minor, who is not *sui juris*, and whose *will*, therefore, cannot concur with the *fact* of his residence, is the domicil of the father (*b*), or of the mother during widowhood, or—though it will be seen this is a disputed point—of the legally appointed guardian.

XCI. It is an undisputed position of all jurists, that of his own accord, *proprio marte* (to borrow the expression of Bynkershoek), the minor cannot change his domicil. In our own country, this maxim was enunciated by Lord Alvanley, Master of the Rolls, in the case of *Somerville* v. *Lord Somerville* (*c*), and in America, in the case of *Guier* v. *O'Daniel* (*d*). It should seem, from all analogy, to follow that such change may be effected by the parents or guardians of the minor.

XCII. But the general question has undergone very full and elaborate discussion by the most distinguished jurists; and, though agreeing upon the general principle, they differ as to the exception from and limitations of it.

(*a*) As to the national *status* of English infant children (33 Vic. c. 14, and 35 & 36 Vic. c. 39), *vide post*, ch. xvii. and vol. i. App. p. 653.

(*b*) *Guier* v. *O'Daniel*, 1 *Binney's* (*Pennsylvanian*) *Reports*, p. 352, note.

(*c*) 5 *Vesey's Rep.* p. 787.

(*d*) *Ubi supra*, p. 349, note.

XCIII. 1. Some, and no less than Denisart, have held, that neither mother nor guardian can change the domicil of a minor whose father is deceased, but that, during his minority, he retains the paternal domicil; and such, in the time of Denisart, appears to have been the law of the French Courts (*e*).

XCIV. 2. Others, like Bynkershoek, have held the doctrine broadly and without qualification, that it is competent to the mother or guardian to change the minor's domicil.

XCV. 3. Others, like Voet and Pothier, and Mr. Justice Story, conceive that the surviving parent may transfer the domicil of the minor from one place to another, except where such transfer is fraudulently made, not for the benefit of the minor, but in contemplation of his death, and for the sake of securing a larger share of the succession to him.

XCVI. 4. Others, and among them Mr. Chancellor Kent, are of opinion, that they have the power of changing the minor's domicil, when acting reasonably and in good faith (*f*).

XCVII. 5. It seems agreed, that this power does not

(*e*) *Denisart*, Domicile, ii. s. 2 (case of the *Comte de Choiseul*); a comparison of the dicta of *Denisart*, *Pothier*, and *Merlin* will show that the French lawyers were by no means agreed upon this point.

(*f*) See last edition of *Kent's Commentaries*, vol. ii. p. 227, Lect. 30, note, where it is said that, in the case of *The School Directors* v. *James*, 2 *Watts & Serg.* p. 568, it was holden that, though the domicil of the *parent* was the domicil of the child, it was not necessary. So in the case of a *guardian*. The parent's influence in this case springs from the institution of marriage and families; and *C. J. Gibson* followed the doubts of *Mr. Justice Story*, and confined the power of changing the infant's domicil to the parent *quâ* parent. It would rather seem to me, that, if there be no competent parent living, and the guardian be duly appointed, he may and ought to, when acting in good faith and reasonably in his character of guardian, be able to shift the infant's domicil with his own, and that the foreign authorities to that point have the best reason on their side. The objection against the guardian's power in such a case appears to me to be too refined and speculative.

belong to the widow if she marries again, and thereby loses her position as the head of the family of her former husband (*g*).

XCVIII. But these differences of opinion are applicable only to the question of *succession* to an intestacy; for all writers are of opinion, that the *forum* of the minor is that of the surviving parent or guardian (*h*).

XCIX. Bynkershoek (*i*), who has devoted a whole chapter to the consideration of this subject of the minor's domicil, has mentioned several cases upon the question of the *forum*.

C. (1.) A native of Y., a minor, went to V., for the purpose of contracting marriage with a native of Amsterdam, obtained the citizenship of V., and caused the banns to be published there and there only, the law requiring that they should be published at the place of the domicil. The guardians of the minor dwelt at Y., and had sent their ward to H. for his education. They procured the marriage to be pronounced null and void, the banns not having been published either at Y. or at Amsterdam, and the minor having been incapable of acquiring a domicil at V.

(*g*) "Minor children having the settlement of their mother do not, by the common law, acquire a new settlement gained by her marriage, although they remove with her to the place of such new settlement." —*Inhabitants of Freetown* v. *Inhabitants of Taunton*, 16 *Mass. Reports*, p. 51.

(*h*) *Robertson on Personal Succession*, p. 275 n.

"Les enfans suivent le domicile que leur mère s'établit sans fraude, lorsque ce domicile lui est propre et que demeurant en viduité elle conserve la qualité du chef de famille : mais lorsqu'elle se remarie, quoiqu'elle acquière le domicile de son second mari, en la famille duquel elle passe, ce domicile de son second mari ne sera pas celui de ses enfans, qui ne passent pas, comme elle, en la famille de leur beau-père : c'est pourquoi ils sont censés continuer d'avoir leur domicile au lieu où l'avoit leur mère avant que de se remarier, comme ils seroient censés le conserver, si elle étoit morte."—*Pothier's Introd. aux Coutumes*, § 19, p. 7.

(*i*) *Quæst. Jur. Privati*, lib. i. c. xvi.

CI. (2.) A youth, born at H., lost both his parents. His guardian, who dwelt at the Hague, sent his ward to different places, and finally to Amsterdam, for the purpose of acquiring a knowledge of mercantile matters. While at this place, the youth determined to contract a marriage; and cited his guardian to appear and show cause, if he had any, against his ward's marriage, before the tribunal of the Delegates of Matrimonial Causes, which was established at Amsterdam. The guardian made two replies to this citation, both null and invalid. First, he denied that a minor could proceed against his guardian in a matrimonial cause, incorrectly, Bynkershoek says; but this question does not concern our present enquiry. Secondly, that the marriage must be published, and the guardian cited at H., where the parents died, and upon the decree of Hadrian, already referred to, which enacted, that those who were resident in a place "studiorum causâ" did not acquire a domicil there; and that the principle of this law clearly embraced the cases of those who were resident "mercaturæ discendæ causâ." This answer, Bynkershoek is of opinion, was also bad; because though it be, generally speaking, true that a minor does not change his domicil by a residence, "studiorum vel mercaturæ causâ," it is so on the assumption that the minor has a domicil elsewhere; but he who has no domicile elsewhere, has his domicil wheresoever he is tarrying. The domicil of the parents of this youth did not affect the question; they were dead, and, according to Bynkershoek, their domicil died with them; and, on the other hand, the place where the marriage is about to be celebrated is the proper place to cite all contradictors.

CII. It will be observed, that in this case the guardian dwelt at the Hague; and the question is not raised as to whether the minor had the domicil of his guardian at the Hague, but of his deceased parents at H.

CIII. The opinion of Bynkershoek, as to the competency of the guardian to change the domicil of his ward, is

in accordance with that of Christinæus and Boullenois, but is at variance with that of Mornac and Pothier (*j*).

CIV. To this latter authority much deference is due; but the reasoning which supports his position does not seem to be forcible. "Minors (he says) do not form a "part of the family of their guardians, as children form "a part of the family of their parents. Their position in "the house of their guardian is the same as if they were in "the house of a stranger; they are there *ad tempus*, for "the time during which their wardship lasts. It follows, "therefore, that the domicil of the guardian is not their "true domicil; and that they cannot be considered as "having any other domicil than the paternal one until "such time as they shall be of an age to establish one for "themselves by their proper choice, and until they have "actually established it" (*k*).

CV. Cochin, on the other hand, seems to assume it as an undoubted fact that the minor's domicil is that of his guardian, and continues so even when the minor is in the king's household, and an officer in the army (*l*).

CVI. Bynkershoek, Boullenois, and others contend that the paternal domicil of the minor is extinct with the death of the father, though it may be, and is, *retained by a continual residence of the minor, under the sanction of the guardian, in the paternal habitation* (*m*); but these jurists are

(*j*) *Pothier, Introduction Générale aux Coutumes des Duchés, &c. d'Orléans*, ch. i. s. 17.

(*k*) *Pothier, ubi sup.* The reasoning of *Duranton* is different; speaking of the modern law, he says, "Et si pour une cause quelconque le père survivant n'exerçait point la tutelle, le domicile du tuteur serait aussi celui du mineur. La loi (art. 108) ne le décide pas textuellement, mais il nous semble que tel est son esprit: l'établissement du domicile est dans l'intérêt de la personne, puisque c'est là qu'elle exerce ses droits civils; et comme, dans l'espèce, c'est le tuteur et non le père qui exerce ceux du mineur, il est conséquent de dire que le principal établissement de celui-ci est au domicile du tuteur."—*Cours de Droit Français*, liv. i. tit. iii. (tome i. § 367).

(*l*) *Œuvres*, tome i. p. 2, *Case of Marquis de Saint-Pater.*

(*m*) So *J. Voet* (though he differs from *Bynkershoek* on this point),

at a loss to conceive why the guardian should not have the power of changing the minor's domicil: and Bynkershoek, especially, is of opinion, that to deny this power is to ascribe to the *domicilium originis* an efficacy with which neither modern practice nor the Roman Law invested it.

CVII. By the Code Napoléon (*n*), the domicil of the minor was that of his guardian: it would seem to follow, therefore, that under this system of law, the guardian might have changed the domicil of the ward. The same provision is to be found in the existing Code Civil; and no doubt is entertained by modern writers as to this power of the guardian (*o*).

CVIII. Though Pothier's objection is couched in language which appears universally applicable to change of domicil by the guardian (*p*), the objection would seem to have been practically confined to cases where the transfer of the domicil varied, in the event of the minor's death, the rights of the representative (*q*).

CIX. As to the power of the surviving mother to change the domicil of her minor children, it had no

lib. v. t. i. s. 102, *De Judiciis*, &c. "Esse enim domicilium iis accensendum, quæ personalia sunt, ac morte personæ evanescunt, frequentius probatum est: eo quod ab animo et voluntate hominis in universum tum constitutio ejus tum continuatio dependet. Dum ergo morte cessat voluntas ac per id etiam tolluntur ea quæ ab illâ pependerant voluntate . . . aliud dici non potest, quam quod etiam morte perierit domicilii jus." See *Bynkershoek, Quæst. J. Priv.* lib. i. c. xvi. p. 177 et seq.

(*n*) *Code*, liv. i. t. iii. art. 108: "Il aura son domicile chez ses père et mère ou tuteur." The *Civil Code of Louisiana* is to the same effect, art. 48, *Kent's Commentaries*, vol. ii. p. 227, note.

(*o*) *Merlin's Répertoire de Jurisprudence*, Domicile, V. s. 3.

(*p*) *Merlin* says, that the only doubt under the old law was as to the case of a guardian who was also an *ascendant* relative of the minor, for that as to the case of a guardian who was a stranger in blood, or a *collateral* relation, it was unanimously admitted that he had no power to change the domicil of the minor.—*Rép. de Jur.* Domicile, V. s. 3.

(*q*) "Posse tutorem pupilli sui domicilium mutare, perinde ut potest parens superstes, nescio quisquam serio dubitaverit si successionis legitimæ causa non versetur, nam si hæc versetur multa disputatio est, ut mox audies."—*Bynkershoek, Quæst. J. Priv.* lib. i. c. xvi.

existence in the Roman Law; but Pothier unhesitatingly asserts its existence under the French Law, with this limitation, that the transfer must be made without any *fraudulent* intent; and he adds: "It will be fraudulent, "if there appears no reason for the transfer of the domicil, "except that of obtaining advantages with respect to the "succession to the moveable property of the children."

CX. Those who agree with Pothier (*r*), liken this power of the surviving parent to that which the guardian of an infant possesses, of binding him by contracts *bonâ fide* entered into in his behalf. Bynkershoek is of a contrary opinion; he puts the case of a minor, the succession to whose property would be regulated according to a law which made his next of kin heirs in the event of his death happening in the place of his parental domicil, being removed by his guardian to another place where a law prevailed which constituted the guardian heir; and he affirms that this latter domicil cannot be impeached, though he admits that the minor could not of his own will (*proprio marte*) have made the transfer.

CXI. He then supposes an objection to be taken that this was a fraudulent defeating of the deceased parents' intention, who left their child in a domicil, according to the law of which they knew that, in the event of his death, his and their relations would succeed to his property; and he answers this objection by remarking that it would have been competent to the parents to have guarded against this contingency, either by an antenuptial act or by a testament, and that as they had not done so, the presumption was that they would not have objected to the effect of the transferred domicil; an argument which has additional weight in a case where such transfer has been effected by the surviving parent instead of the guardian, for the presumption then would be very strong "that the

(*r*) *Burge's Commentaries on Colonial and Foreign Laws*, vol. i. p. 39.

" defunct parent loved the surviving partner of wedlock " better than any relations, and was, besides, perfectly " aware that the child, having attained to puberty, could, " under any change of domicil, dispose of his property by " testament, according to his pleasure."

CXII. Some jurists have been of opinion, that the domicil of the minor may be changed by the surviving parent or guardian, when by such transfer no third person is injured —when it is not made *in fraudem tertii* (*s*),—that in such cases it must be duly considered *quo animo* the transfer was made. And it has been said that one of the indications of fraud would be the state of health (*t*) of the minor at the time of his removal; that if he was sick and ill at such time, the presumption of fraud would be strong; if he was well and stout, it would be otherwise. Bynkershoek treats (*u*) the objection and the example with scarcely suppressed ridicule, and meets them with strenuous contradiction, founded on the practical impossibility of ascertaining the real motives of the parties, the insuperable difficulty of defining the amount and nature of the illness during which a removal shall be holden fraudulent, the uncertainty of the proofs, and other objections, which would throw the whole matter into such confusion that it would be a wiser rule of law to hold every transfer of a minor's domicil which caused an alteration in the succession to his property, fraudulent and illegal.

(*s*) So *Wolff*, maintaining the position that every one is at liberty to change his domicil, observes, " Quoniam tamen unicuique permittendum, ut voluntatem suam mutet, quamdiu nil agit contra jus alterius." —*Jus Gentium*, c. i. s. 189.

(*t*) Of this opinion is *J. Voet, Comm. ad Pandectas*, lib. v. t. i. s. 100.

(*u*) " Sed quem vocas languentem et ægrotantem, non, putem, si caput, si dentes doleant. Sed quid si febricula comes adsit? Nescio, et lubrica res esset gradum morbi definire. Si simile quid placeret, mallem omnem translationem domicilii, quæ successionem intestati mutat, habere pro fraudulentâ, nisi probetur, aliam fuisse mutandi domicilium causam."— *Bynk. ubi suprà.*

CXIII. Mascardus mentions the following case:—A boy was born in the parish of St. Peter's; he was left an orphan under the guardianship of his great-grandmother, who resided in the parish of St. Paul's, and there she took the minor to live with her, which he did for fourteen years, there attending the services, and there receiving the Sacraments of the Church. Nevertheless, he had always wished to remain in the parish of St. Peter's. He paid, it is said, tithes there and other ecclesiastical dues, and kept his name on the list of parishioners, and had a furnished house in the parish. When he became an adult he married, and told his guardian that it was his intention to take his wife to his own house (*proprios lares*), where everything was prepared for her reception. Before, however, this was accomplished, and at the age of eighteen, he died, having made his will, and expressed his desire to be buried in the burying-place belonging to a certain religious order. By the Canon Law, this order was bound to pay a certain part of the dues of sepulture to the parish church. The question arose, which church that was—that of St. Peter's, the parish of his parents, and, as far as he could make it, his own, or of St. Paul's, that of his guardian, and within whose authority he had died. Upon this question the Canonists were much divided, there being about the same weight of authority for either opinion (*x*).

CXIV. In a case argued in the Consistory of London, in 1752, it was mentioned as one of the acknowledged general principles of Domicil, that neither a mother nor a guardian could change the minor's domicil; but the point was not decided by Sir Edward Simpson, who then presided over that Court (*y*).

(*x*) *De Probationibus*, Conclusio DXXXV. 30–35. "Utraque pars validissimis est fulcita rationibus. . . . Cui tamen adhæreas sententiæ tuum, lector, esto judicium," *Mascardus* not very satisfactorily observes.

(*y*) *Scrimshire* v. *Scrimshire*, 2 *Haggard's Consistory Reports*, p. 405.

CXV. In 1817, the question of the powers of the surviving mother underwent very elaborate and able discussion in the High Court of Chancery, before Sir William Grant. Thomas Pottinger, a native of England, domiciled and died in Guernsey, the place of his domicil, intestate, leaving seven children living at his decease, four by his former wife, and three by his widow, who also gave birth to a posthumous child. The widow, after the death of her husband, was appointed guardian of her children by the Royal Court of Guernsey, and, in conjunction with another person, who was appointed guardian of the children by the former marriage, sold the property of the intestate, and invested the produce in the English funds; after which she came to England with her children, and was domiciled there. On the death of some of her children under age, a question arose whether the shares of the property had become distributable according to the laws of England or of Guernsey. The very eminent judge who adjudicated upon this matter, observing upon the meagre information to be derived from English Law upon the subject of Domicil, and the necessity of resorting to the writings of foreign jurists for the decision of most of the questions arising upon it, said: "Here the question "is, whether, after the death of the father, the children "remaining under the care of the mother follow the "domicil which she may acquire, or retain that which "their father had at his death, until they are capable of "gaining one by acts of their own. The weight of "authority is certainly in favour of the former proposi-"tion. It has the sanction both of Voet and Bynkers-"hoek; the former, however, qualifying it by a condition "that the domicil shall not have been changed for the "fraudulent purpose of obtaining an advantage by altering "the rule of succession. Pothier, whose authority is "equal to that of either, maintains the proposition as thus "qualified. There is an introductory chapter to his "Treatise on the Custom of Orleans, in which he considers

"several points that are common to all the customs of "France; and, among others, the Law of Domicil. He "holds, in opposition to the opinion of some jurists, that "a tutor cannot change the domicil of his pupil; but he "considers it as clear, that the domicil of the surviving "mother is also the domicil of the children, provided it be "not with a fraudulent view to their succession that she "shifts the place of her abode. And he says that such "fraud would be presumed, if no reasonable motive could "be assigned for the change.

"There never was a case in which there could be less "suspicion of fraud than the present. The father and "mother were both natives of England. They had no "long residence in Guernsey; and after the father's death "there was an end of the only tie which connected the "family with that island. That the mother should return "to this country, and bring her children with her, was so "much a matter of course that the fact of her doing so "can excite no suspicion of an improper motive; I think, "therefore, the Master has rightly found the deceased "children to have been domiciled in England. It is, "consequently, by the law of this country that the suc- "cession to their personal property must be regulated" (*a*).

CXVI. It would appear that the very eminent judge who decided this case inclined to the opinion of Pothier, in opposition to that of Bynkershoek, that the question of fraud might be entered into in considering a change of domicil; but the decision can hardly be pronounced to be

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(*a*) *Pottinger* v. *Wightman*, 3 *Merivale's Reports*, p. 67. The principle of this case has been adopted in America.—*Holyoke* v. *Hoskins*, 5 *Pickering's Reports*, p. 20; *Kent's Commentaries*, vol. ii. p. 227, note.

See also *Inhabitants of Woodend* v. *Inhabitants of Paulsbury*, 2 *Lord Raymond's Reports*, p. 1473; *Cumner* v. *Milton*, 2 *Salkeld's Reports*, p. 523; *Rex* v. *Inhabitants of Boston Torfe*, *Burrow's Settlement Cases*, p. 49; *Rex* v. *Inhabitants of Oulton*, *ibid.* p. 64; *Woodeson's Lectures*, pp. 278-9; 1 *Nolan's Poor Laws*, 236-76; *Kent's Commentaries on American Law*, vol. ii. pp. 430, 431, notes.

express upon this point. It is said: "There never was a "case in which there could be less suspicion of fraud:" but it is not said, that if there were a suspicion of fraud, the Court would examine into it. In this case, it happened that the surviving mother was also guardian, but the decision has reference to her only as acting in the former capacity.

CXVII. With respect to the effect of the judgment in *Pottinger* v. *Wightman*, it should be mentioned that in a modern and very important case, adjudicated upon by the House of Lords, Lord Campbell said: "I think that the "case of *Pottinger* v. *Wightman* must be taken conclusively "to have settled the general doctrine, that if, after the "death of the father, an infant lives with its mother, and "the mother acquires a new domicil, it is communicated "to the infant" (*b*); and Lord Chancellor Lyndhurst made this observation: "The case of *Pottinger* v. *Wight-* "man appears to have been well argued and well considered, "and must be held conclusive as to the mother's power "to change the domicil,—which is a novel point in the law "of England—unless there is some opposite decision."

CXVIII. According to the principles of the Scotch Law, it would seem that the power of choosing a domicil would vest in the minor on attaining puberty, at the same age as would formerly have been sufficient to render the marriage or the testament of a minor valid. Erskine says, "The persons of pupils are under the power either "of their tutors or of their nearest cognates; but the "minor after pupilarity has the disposal of his own person, and may reside where he pleases" (*c*). Where the law of the country permits a minor to dispose of personal property by testament, it would, of course, allow him, by changing his domicil, to vary the succession to him in the case of an intestacy.

(*b*) *Johnstone* v. *Beattie*, 10 *Clark & Finnelly*, p. 138.
(*c*) *Erskine's Principles of the Law of Scotland*, bk. i. t. vii. s. 8.

CXIX. The principle of the judgment in *Pottinger* v. *Wightman* has been adopted by the American tribunals (*d*), but I am not aware that any express decision has been delivered, in the Courts either of that country or of England, upon the question of the power of the guardian or tutor to change the domicil of the minor. The present laws of France, [Italy, and Holland] declare the domicil of the unemancipated minor to be that of his father, mother, or guardian (*e*).

Mr. Henry, in his commentary upon the case of *Pottinger* v. *Wightman*, observes, that although the transfer of domicil was holden to be valid in that particular case, nevertheless, inasmuch as, wheresoever the law of Holland is in force, the children have a vested interest, he conceives no change of property or of domicil by an executor or guardian would affect that (*f*).

CXX. What might be considered emancipation of a minor under the English Law may be doubtful; but it seems clear at least that the marriage (*g*) of the minor would emancipate him, and give him the power of acquiring a new domicil (*h*).

CXXI. According to the old law of France (*i*), the minor preserved his paternal domicil, although his guardian was domiciled elsewhere; and, if the minor died during his

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(*d*) *Holyoke* v. *Hoskins*, 5 *Pickering's Reports*, p. 90, note.

(*e*) "Le mineur non émancipé aura son domicile chez ses père et mère ou tuteur."—*Code Civil*, liv. i. t. iii. art. 108.

["Il minore non emancipato ha il domicilio del padre o della madre o del tutore."—*Italian Civil Code*, tit. ii. art. 18. "Minderjarigen volgen de woonplaats van hunne ouders of voogden."—*Dutch Civil Code*, tit. iv. art. 78.]

(*f*) *Odwin* v. *Forbes*, *Henry's Report*, App., p. 208, note.

(*g*) One of the cases allowed by the French Law; see thereon, *Code Civil*, liv. i. t. x. c. iii. art. 476-487.

(*h*) Whether a guardian validly appointed in any given country has an authority for the protection of the ward, and the administration of his personal estate everywhere *ex comitate*, has been a matter of some dispute with jurists. *Vide post*, chapter xxv.

(*i*) *Denisart*, Domicile II., s. 2. So the Roman Law: "Placet

minority, his effects were disposed of according to the law of his father's domicil. Yet the minor might acquire a capacity of choosing his own domicil by being emancipated by the law, or by the sentence of a judge. It should seem from the following case, that such a capacity was acquired by entering into the military service (*j*).

CXXII. The Sieur Délattre, who served as an officer in the French army, passed the winter of every year at Dunkirk. He died at the age of eighteen. A question arose whether his domicil could be fixed at Dunkirk, or whether he was not bound to the domicil of his guardian at St. Omer, where his mother had been domiciled at the time of her death, and where his guardian was then domiciled. The disposition of his personalty varied accordingly. The Court at Montreuil pronounced for the domicil of St. Omer; but the sentence was reversed by an "arrêt" (1769), which decreed in favour of the domicil of Dunkirk (*k*).

CXXIII. But Cochin was of opinion that the Marquis de St. Pater did not cease to have the domicil of his guardian by becoming the King's page, or by obtaining a company of infantry under the Dauphin (*l*).

CXXIV. So by accepting a benefice, or other office from which he is not removeable, or by entering into a house of commerce, with the consent of those under whose con-

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etiam filiosfamilias domicilium habere posse." "Non utique ibi ubi pater habuit, sed ubicunque ipse domicilium constituerit."—*Dig.* lib. 1. t. i. 3, 4.

(*j*) *Vide antè*, § xciii.

(*k*) In the edition of *Denisart*, of 1787, tome vi. Domicile II. s. 2, it is said that it is difficult to see the "*motif*" of this "arrêt," and that it is only reprinted because it is in the former edition. Surely, however, the ground of the decree must have been that the Sieur's employment as an officer capacitated him to choose a domicil; and such, I find, is the opinion expressed in the last edition of *Merlin*, where this "arrêt" is characterised as one "qui a nettement jugé que le mineur émancipé pouvoit se choisir un domicile."—*Merlin, Rép.* Domicile V. s. 3.

(*l*) *Cochin, Œuvres*, tome i. p. 2.

trol he is, the minor becomes emancipated, and capable of acquiring a domicil of his own.

CXXV. By marriage, also, the minor may acquire either the domicil of his wife, or, after marriage (*m*), any domicil he may choose.

CXXVI. According to Pothier, the marriage must have been contracted with the consent of one of his parents or guardian; but it can scarcely be doubted, as has been observed, that in Great Britain a minor once married, whether with or without the proper consent, would be holden capable of choosing his domicil (*n*).

CXXVII. It would appear from the following case that the Scotch Law would refuse equally to mother and guardian the power of changing the minor's domicil; for though the case of *Pottinger* v. *Wightman* (*o*) is the only express decision in an English Court relative to a change of domicil during infancy, yet some very strong judicial dicta have been applied to this question in Scotland, though the case which gave rise to them was not decided upon this, but upon another point.

CXXVIII. It was brought in 1829 before the Court of Session in Scotland. Robert Alexander Paterson Wallace was born in Scotland; his father, Captain Wallace, was also by birth a Scotchman, and an officer in the army, who had married Miss Oliver, an English lady, in England. The

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(*m*) "Il paraît en effet que le domicile occasionné par le mariage doit l'emporter sur celui de la naissance."—*Merlin, Rép.* Domicile V. s. 3.

(*n*) "Un mineur ne peut pas transférer à son gré son domicile : il le peut néanmoins en certains cas : 1. Il peut, en contractant mariage du consentement de ceux sous la puissance desquels il est, transférer son domicile au lieu où il prend sa femme, et il peut même, depuis qu'il est marié, le transférer où bon lui semblera. 2. Un mineur peut transférer son domicile soit au lieu où il est pourvu d'un bénéfice ou d'une charge, ou autre emploi non amovible qui demande résidence perpétuelle ; soit au lieu où, du consentement de ceux sous la puissance desquels il est, il formeroit un établissement de commerce."—*Pothier, Introduction générale aux Coutumes*, p. 4, (chap. i. s. 16).

(*o*) 3 *Merivale's Rep.* p. 67.

father named guardians to his child, one of whom, the maternal grandfather, Mr. Oliver, resided in England; another, Mr. Hathorn, resided in Scotland. The father died when the infant was of tender years, and the child was conveyed by his mother into England. She also died during the infancy of the child, who continued in England, under the charge of his maternal grandfather, one of his guardians, and was sent to English schools and to an English university. The bulk of the property consisted in stock of the Bank of Scotland. He occasionally visited that country, as well before as after he came of age. He purchased a small landed estate in Scotland after he had attained majority. He died at Hastings, in England, in 1824, aged twenty-two years and seven months, a bachelor and intestate.

His personal property was claimed, in the Courts both of England and Scotland, by his maternal grandfather as next of kin, according to the law of England; and by his paternal uncle and aunt, as his next of kin according to the law of Scotland.

CXXIX. The Lord Ordinary (Cringletie) gave the following note on the cause when he pronounced his Interlocutor.

"3rd December, 1829.—The Lord Ordinary regrets that "the parties have thought it necessary to detail the circum- "stances of Captain Wallace's marriage with Miss Oliver in "England and the terms of his contract of marriage with "that lady, as to the Lord Ordinary they appear not to "have the least bearing on the cause. A man by marrying "in England an Englishwoman does not thereby become "domiciled there: nor is it necessary that he should reside "a day there for that purpose: far less does he make his "children domiciled there by the mere act of marrying in "England. The lady resides in a certain parish for a spe- "cified time to enable her to be married in the church of it, "and an oath must be made that such has been her resi- "dence and domicil, otherwise she requires a special license

"to be married." (The Lord Ordinary here further illustrated this position by an anecdote respecting his own marriage.) "Captain Wallace, having been a Scotchman "in the army, did not acquire any domicil by marrying "there, but returned to Edinburgh, where he sold out of the "army, lived there for some time, and died here. There "can, therefore, be no doubt that he died here domiciled "as a Scotchman. As to his son, R. A. Wallace, it is "admitted that he was born in Edinburgh, and went to "England with his mother. Even had there been no con-"tract made before he was permitted to accompany her, the "Lord Ordinary could have no doubt that, had he died in "pupilarity, his legal domicil of Scotland would not have "been changed by his residence in England: a pupil has no "*persona standi*, has no will in law, and he cannot act for "himself—could not fix his domicil—cannot make a will. "*But the matter is quite changed when he passes the years of* "*pupilarity*. As a domiciled Scotchman he is entitled to "act for himself with the consent of his curators: *he is* "*entitled to live where he pleases*: for curators have no "control over his person." (In support of this position the passage in Erskine already referred to was cited.) "The "defenders seem totally to have lost sight of this principle. "They state their case as if Mr. Hathorn could have pre-"vented R. A. Wallace from living in England; as if he "placed him there, and was at the expense of his education "there: when it is quite plain that it was Mr. Hathorn's "indispensable duty to advance the minor's own funds to "him for a suitable and reasonable maintenance and educa-"tion. Still, residence merely for education may be ques-"tionable how far it constitutes a domicil to govern succes-"sion. *But when education is over, when a man attains* "*majority, and still resides in England, making only short* "*visits to Scotland, having no house of his own in which he* "*lives in Scotland, and dies in a house in England of his* "*own*—the Lord Ordinary confesses that he thinks there "is little room for doubting what must be held to be his

"domicil. From the admitted facts in the case the ques-
"tion appears to have been fairly tried in a competent
"Court in England; and a question may arise how far it
"is proper or competent to try it again here; and whether
"an appeal from the English judgment would not be the
"mode to obtain redress" (*p*).

The matter was subsequently settled by compromise, and the proceedings in the Court of Scotland withdrawn.

CXXX. The proceedings in England, to which the Lord Ordinary referred, took place in 1825, before the Prerogative Court of Canterbury, where the same parties, viz. the paternal uncle and aunt on the one side, and the maternal grandfather on the other, respectively claimed administration. Sir John Nicholl decided in favour of the latter, finding the domicil of the deceased to be English, and founding this opinion entirely on the evidence that the deceased had chosen a domicil for himself after the attainment of his majority. The point as to whether or no a domicil could be changed during infancy was not alluded to by the judge (*q*).

CXXXI. According to the Roman Law (*r*), it devolved on the Prætor to settle the place of abode and education of the minor.

CXXXII. The illegitimate (*s*) minor, according to the doctrine of the Roman Law (*t*), obtained the domicil of his

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(*p*) *Robertson on Personal Succession*, p. 201, note.

(*q*) There is no report of this important case, but a summary of it is given in *Robertson on Personal Succession*, p. 275, note.

(*r*) "Solet Prætor frequentissimè adiri, ut constituat, ubi filii vel alantur *vel morentur*; non tantum in postumis, verum omnino in pueris."—*Dig.* lib. xxvii. t. ii. 1. "Si disceptetur ubi morari vel educari pupillum oporteat, causâ cognitâ id Præsidem statuere oportebit."—*Ibid.* 5.

(*s*) As to the policy of different States with respect to illegitimate children, *vide post*, ch. xxiv.

(*t*) "Ejus qui justum patrem non habet prima origo a matre, eoque die, quo ex eâ editus est, numerari debet."—*Dig.* lib. l. t. i. 9.

Story's Conflict of Laws, ch. iii. s. 46.

mother; and this doctrine seems to have been generally recognized in Europe; but in Germany the illegitimate child does not follow the mother in territorial relations which she may acquire through marriage. The tendency in that country appears to be in favour of regarding the father who recognizes, as well as the father who adopts, the child, as imparting his domicil to the child (*u*). The *Foundling* takes his domicil from the place of his finding, but removal to a place for education or adoption may confer a new domicil (*x*).

(*u*) *Bluntschli, Das moderne Völkerrecht*, s. 366, cited by *Wharton*, s. 37.

(*x*) *Wharton*, s. 39; *Savigny, R. R.* viii. s. 389; *Fœlix*, tome i. pp. 53, 54, & 54 note, (livre i. tit. i. parag. 28).

CHAPTER X.

III. NECESSARY DOMICIL—THE STUDENT.

CXXXIII. The maxim of the Roman law upon this head has been generally adopted by European jurists; namely, that those who sojourn in a particular place, for the purpose of prosecuting their studies, do not acquire a domicil in that place. Ten years are the period specified in the Roman Law, during which no domicil was created; and the inference seems to be, that if they continued to stay there after the lapse of that time, a domicil would be acquired. It was further provided by that law, that no father who frequented the scene of his son's studies should obtain a domicil there. This doctrine, therefore, was especially applied to minors; the principle of it would, however, appear to include majors (*a*).

(*a*) "Nec ipsi qui studiorum causâ aliquo loco morantur domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes sibi constituerint, secundum epistolam Divi Adriani; nec pater qui propter filium studentem frequentiùs ad eum commeat."—*Cod.* lib. x. t. xxxix. 2.

There has been a decision upon the point in America: *The Inhabitants of Granby* v. *Inhabitants of Amherst.* According to this case, a student of a college does not change his domicil by his occasional residence at college; (a settlement case) 7 *Mass. Reports*, p. 1. *Putnam* v. *Johnson and others* decided that a student in the Theological Institution at Andover, being of age and emancipated from his father's family, is entitled to a vote in that town for the election of senator, 10 *Mass. Reports*, p. 492, c. 488. Domicil and the right to vote in America are not to be confounded, Mr. Wharton (s. 48) observes.

IV. NECESSARY DOMICIL—THE LUNATIC.

CXXXIV. The power of the guardian with respect to the domicil of the lunatic and the idiot seems to fall under the principle already discussed of his power with respect to the domicil of the minor (*b*).

CXXXV. By the old law of France the lunatic either preserved the domicil of his origin, or that which he had last chosen before he had been placed under the care of a *Curator*. By the Code Civil the domicil of the *Tutor* (*tuteur*) determines that of the lunatic (*c*).

CXXXVI. That a similar rule obtains in England (*d*) seems a reasonable inference from the following case (*e*).

George Morrison was born and resided in England. In July 1742 he lent 2,100*l.* to his nephew the Earl of Sutherland, then in London, who granted bond for it in the English form. On a commission of lunacy in England Mr. Morrison was afterwards found to be a lunatic, and two grants were issued under the Great Seal: one by which

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(*b*) *M. de Desquiron* observes, "Le majeur qui est frappé d'interdiction perd l'administration de ses biens, parce qu'il est reconnu dans un état de faiblesse qui l'assimile aux mineurs non-émancipés: dès lors il cesse d'avoir un domicile parce qu'il a perdu la qualité nécessaire pour manifester sa volonté.—*Traité du Domicile*, s. 50, p. 94.

(*c*) "Le majeur interdit aura son domicile chez son *tuteur*."—*Code Civil*, art. 108. In the first edition of the Code the word was "*curateur*." See *Duranton's Cours de Droit François*, liv. i. t. iii. s. 371; *Merlin Rép. de Jurisp.* Domicile V. s. 4. [Cf. the *Italian Civil Code*, tit. ii. art. 18: "Il maggiore interdetto ha il domicilio del tutore;" and the *Dutch*, tit. iv. art. 78: "Minderjarigen volgen de woonplaats van hunne ouders of voogden; meerderjarigen, die onder curatele zijn gesteld, die van hunne curators."]

(*d*) Mr. Westlake remarks that this is the modern French rule, because the uniformity of the present law in France has deprived the domicil of its effect on the distribution of property after death; and this may be the reason.—*Westlake*, pp. 47-8.

(*e*) Mr. Westlake is of a different opinion.—*Ibid.*

the custody of the person of the lunatic was granted to Sir Nicholas Bayley; the other by which the custody of the estate and effects of the lunatic was granted to Walter Baynes and Penelope, his wife, the brother-in-law and sister of the lunatic. These last, as such committees, brought an action upon the bond against the Earl of Sutherland in the Court of Session. In defence, he contended that the lunacy had not been established in Scotland; that the law upon the subject was different in the two countries; and that the rules of distribution of the personal estate of lunatics were also different.

CXXXVII. The question was argued several times before the Lord Ordinary. The defendant contended that the Lord Chancellor had no power to direct the management of any estate *extra territorium*. The pursuers answered that *statuta personalia loci domicilii* must bind everywhere, and that *mobilia sequuntur personam*, and are regulated by the law of the place of domicil. The pursuers applied to the Lord Chancellor, stating this process and defences; that the debt was in danger, and praying that the committees might have access to the lunatic to obtain a power of attorney from him to authorise them to sue for this debt. This application the Lord Chancellor granted. The power of attorney was accordingly obtained, and the committees then insisted upon both titles. The Court of Session (June 21, 1749) found that there was no sufficient title produced to carry on the action, and therefore sustained the defence. But this judgment was reversed upon appeal to the House of Lords, and it was "declared that there was a sufficient "title in the appellant, George Morrison, to carry on the "action commenced by the appellants, and that the same "be sustained at the instance of the said Morrison" (*f*).

(*f*) This account of *Morrison's* case is taken from *Robertson on Personal Succession*, pp. 113, 114. The exact grounds of the decision may be doubtful, but the inference from *Lord Hardwicke's* reference to it in *Thorne* v. *Watkins*, 2 *Vesey Senior's Rep.* p. 35, certainly is, that it was

CXXXVIII. In *Leith* v. *Hay* (1811), the Court of Sessions sustained an action in Scotland upon the bond granted to the King by the committee of an *English* lunatic and his sureties, such *committee and sureties being domiciled in Scotland.* In this action decree was granted for payment of the bond, and the money was directed to be paid into the Bank of Scotland upon a receipt, till, upon application to the Lord Chancellor, his Lordship should "direct in what "manner the money so to be paid shall be remitted to the "proper officer of the Court of Chancery for the benefit of "the estate of the said lunatic." Mr. Robertson remarks, that there is nothing in the report with regard to the domicil of this lunatic.

CXXXIX. In *Bempde* v. *Johnson*, where the English domicil prevailed rather by the weakness of the Scotch domicil than by its own strength, the question was glanced at, but not decided (*g*). The Lord Chancellor said, "Wher-"ever he" (Lord Annandale) "had a place of residence that "could not be referred to an occasional and temporary "purpose, that is found in England and nowhere else. "I am not clear that the period of his lunacy is totally "to be discarded, but I will take him to have died "there" (*h*).

CXXXIXA. When an infant is of unsound mind and remains continuously so, an English Court has decided that the incapacity of minority continues, so as to confer on the father the right of choice in the matter of the domicil

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decided upon the great principles of law. The American Courts hold that the power of guardians over their ward's property does not extend to property in Foreign States.—*Story's Conflict of Laws*, ss. 504–504 (a). That is, new letters of guardianship must be obtained from the local tribunals. There is a close analogy to the case of foreign executors and administrators, he remarks.

(*g*) There were, however, two commissions of lunacy, one in England and one in Scotland, and two curators appointed, one in each country.

(*h*) *Bempde* v. *Johnson*, 3 *Vesey's Rep.* p. 198.

of the son; and the father's change of domicil works a change in the son's domicil (*i*).

CXXXIXB. The law of the United States of America appears, from Mr. Wharton's recent work, to be as follows:—

Whether a domicil acquired when sane can be divested by a guardian of the ward after the latter has become insane, may be doubted. It has been denied in Maine (*j*). On the other hand, in a late case in Vermont (*k*), the law is thus expressed by Judge Wilson: "If the guardian could not "change the domicil of an insane person, he might be re- "quired to support him and his family at a place where the "price of everything necessary for their support was exor- "bitant, and greatly exceeding the means of the family. "When Holmes was appointed guardian, he became sub- "stitute for his insane ward, with reference to all his inter- "ests, to act for him in the management of his property, "and to fix the locality of his person, and determine his "domicil (*Gen. Sts.* p. 484, § 49; *Cutts* v. *Hoskins*, 9 *Mass.* "p. 542; *Upton* v. *Northbridge*, 15 *Mass.* p. 237). In the case "of *Holyoke* v. *Hoskins* (5 *Pick.* p. 20), it appeared that Miss "Elliot, the intestate, was *non compos mentis*. She was "born in the county of Suffolk, and removed, upon the death "of her father, into the county of Middlesex, where she "lived as part of her brother's family for many years, and "until her death—being for the last years of her life under "a guardian, who provided for her support, and whose "residence was in Suffolk. In that case the Court de- "cided that the domicil of a person *non compos mentis*, under "guardianship, may be changed by the direction or with "the assent of the guardian; that her domicil at the time "of her death was in Middlesex; that the Probate Court "of Middlesex County had jurisdiction; and that Letters

(*i*) *Sharpe* v. *Crispin*, *L. R.* 1 *Probate and Divorce*, p. 611 (1869).
(*j*) *Pittsfield* v. *Detroit*, 53 *Maine*, p. 442.
(*k*) *Anderson* v. *Anderson*, 42 *Vermont*, p. 350.

"of Administration on her estate granted by the Probate "Judge of Suffolk were void for want of jurisdiction. It "was strongly urged that, upon the facts, the legal domi- "cil of Miss Elliot still continued in Boston (Suffolk "County), the place of her birth, notwithstanding her "removal to Natick, in the county of Middlesex, and her "long residence there, because, by reason of her mental "disability, she had not, it was said, the power to acquire "a new domicil. The opinion of the Court in that case "was delivered by Wilde, J., in which he says: 'It is clear "that, 'by our law, a guardian has the same power over "'his ward that a parent has over his child. He has the "'custody of his person, and may appoint the place of his "'residence. The domicil, therefore, of an *idiot* may be "'changed by the direction or with the assent of his "'guardian, whether expressed or implied'" (*k*).

V. NECESSARY DOMICIL—THE SERVANT.

CXL. We have now to consider the case of the Servant. A combination of *fact* and *intention* has been said to be necessary for the constitution of a Domicil, and this principle would seem to preserve to the domestic servant the Domicil which he possessed before entering into service.

CXLI. According to Voet, however, the presumption founded on experience is, that the domestic servant has abandoned his native domicil without any intention of returning to it; and, therefore, has acquired another domicil, which must be the domicil of the master with whom he is living. He likens the case of servants to that of tutors, who, he thinks, acquire the domicil of the pupils with whom they reside, and to that of the freed men (*liberti*) among the Romans, who acquired the domicil of their patrons;

(*k*) *Wharton*, ch. ii. s. 52, p. 58.

between these freed men and the modern domestic servant Voet conceives a very close analogy to subsist (*l*).

CXLII. But it is a question much depending upon the particular circumstances of each case. If a servant, having quitted his domicil of origin, remains for a long period of time at one particular place in the employment of several masters, and has collected together in that place his earnings, the legal presumption would be the abandonment of the original, and acquisition of a new domicil. But a contrary presumption would flow from the circumstances of his having been known to return several times to the place of his birth in the interval of his servitudes to different masters, and of his having deposited his savings and property there; the intention of preserving his original domicil would be fairly deducible from this conduct.

CXLIII. Claude Doumayron, born near Rhodès, quitted his country soon after the death of his father, and came to Paris. He remained there for twenty years in the capacity of servant to the Sieur Bergeret, and in that service he died. The question was, whether the succession to his personalty (*la succession mobiliaire*) should be ruled by the custom of Paris or by the Roman Law (*droit écrit*). He was holden to have been domiciled at Paris. The number

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(*l*) "Famulos ancillasque nostrates quod attinet, etsi liberi sint et certâ mercede conducti nobis operas præstent, nec familiæ nostræ perpetuò addicti sint; *tamen vix est ut existimemus eos proprium retinere domicilium*, quippe à quo plerumque eos secedere animo non revertendi experientia testatur. Quin potiùs eos ex domicilio domini cui ministrant censeri, et competens sortiri forum suadent juris rationes: si enim nuncii scholarium ac ministri cum scholaribus studiorum causâ degentes, ex personâ eorum, quibus ministrant forum sortiantur privilegiatum, et ex quali quali domicilio ac jure scholarium in loco studiorum æstimentur (*auth. habita C. ne filius pro patre*), cur non, cessante illo foro privilegiato, in loco domicilii dominici propriè sic dicti convenirentur, ratio non est. Cui accedit quod et liberti Romani, utcunque liberi, patronorum suorum non originem modo sed et domicilium sequebantur; quos tamen in obsequiis et operis præstandis non longè a famulis hodiernis abiisse constat," &c. *J. Voet*, lib. v. t. i. 96.

of years and the uninterrupted residence seem to have been the foundation of this decision of the French tribunal (*m*).

CXLIV. Nicolas Sautereau had his domicil of origin in Burgundy; he came to Paris while a minor: during his stay there he served as a kind of steward (*régisseur*) to different masters, but especially the family of Bonnelles. He was sent by one of his masters, in that capacity, to Ferraques, near Lisieux, and there he died. Five advocates decided that he had never lost his domicil of origin, and that his succession must be regulated by the custom of Burgundy, because the nature of his employments at Paris and Ferraques was not such as to acquire for him a domicil. "He lived" (they said) "by his masters' wages, was subject "to their wills, and was under the necessity of following them whithersoever they went." He had, in fact, never enjoyed a state of liberty requisite to enable him to found a domicil (*n*).

CXLV. An ancient custom exempted all persons domiciled at Nevers (*o*) from the payment of certain duties in the trade of corn and wine. Berger, a domestic servant of a lady, and Berthaut, who acted in the same capacity to a religious order of the community, claimed this exemption. The Advocate-General, however, unhesitatingly pronounced against their claim upon the ground that, as domestic servants, they could not have acquired any domicil. His opinion was confirmed by an "arrêt" of Parliament with respect to Berger. With respect to Berthaut, they allowed him one month to prove—1stly, that when the demand for duty was made upon him, he was actually domiciled at Nevers; 2ndly, that he paid the "taille;" 3rdly, that he was married and had a wife and children; 4thly, that he had always traded in corn and wine; and in the event of

(*m*) *Denisart*, tome vi. Domicile, II. s. 3 (p. 662, ed. 1787).
(*n*) *Denisart, ibid.*
(*o*) *Merlin, Rép. de Jur.* Domicile IV. s. 2.

his failing in such proof, they confirmed the sentence of the Advocate-General (*p*).

CXLVI. The Code Civil expressly declares that every person of full age who is in the habit of acting as a servant or a workman to another, if he reside in the same house as his master, shall be holden to be domiciled therein (*q*).

CXLVII. According to the Prussian Law and to Savigny, hired servants (*Dienstboten—serviteurs à gages*), day labourers on an estate (*auf einem bestimmten Landgute bleibend arbeitende Tageslöhner—journaliers constamment occupés dans un domaine rural*), apprentices to a particular master (*bei einem bestimmten Handwerksmeister arbeitende Gesellen—ouvriers qui exercent leur métier chez un maître*) have the domicil of their employers (*r*).

CXLVIII. The slave, of course, would have no domicil but that of his master, but the manumitted person was holden by the Roman Law to have acquired the domicil of the manumittor (*s*).

(*p*) It was said by the *Attorney-General*, in the case of the *Countess of Dalhousie* v. *M'Douall*, that a servant who followed his master for a particular service, did not thereby lose his domicil of origin.—7 *Clark & Finnelly's Reports*, p. 331.

(*q*) Art. 109. "Les majeurs qui servent ou travaillent habituellement chez autrui, auront le même domicile que la personne qu'ils servent ou chez laquelle ils travaillent, lorsqu'ils demeureront avec elle dans la même maison."

(*r*) *Savigny*, R. R. viii. s. 353.

Cf. *Preussische allgem. Gerichtsordnung*, Theil I. tit. ii. § 13. [Cf. *Dutch Civil Code*, tit. iv. art. 79: "Meerderjarige dienstboden of werklieden hebben hunne woonplaats in het huis van diegenen, bij welke zij dienen of werken, indien zij bij dezelve inwonen."]

(*s*) *Dig.* lib. l. t. i. 27, which says, "Ejus qui manumisit *municeps* est manumissus, non domicilium ejus sed patriam secutus." Lex 22 says, "Filii libertorum libertarumque, liberti paterni et patroni manumissoris, domicilium aut originem sequuntur."—"*Cives* quidem origo, manumissio, allectio, vel adoptio, *incolas* vero domicilium, facit."—*Code*, lib. x. t. xxxix. 7.

CHAPTER XI.

VI. NECESSARY DOMICIL—THE PUBLIC OFFICER.

CXLIX. So much was the liberty of the freeman to choose his own domicil respected by the Roman Law, that it was not allowed to be restrained by any act of another private individual (*a*). If a legacy was left to a freeman on condition that he fixed his domicil in a particular *civitas*, the condition was set aside (*b*).

CL. But it was fully competent to the Law of the State, or the Public Law, to place restrictions upon this liberty; and the Roman Law—followed in this, as well as in other regulations relating to Domicil, by modern Law—has affixed a particular domicil upon certain public servants (*c*) of the State, and upon certain criminals (*d*).

CLI. This leads us to consider the domicil of the Public Officer of the State. The existing French Code has laid down the following rules respecting the domicil of the

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(*a*) "Nihil est impedimento quo minus quis ubi velit habeat domicilium quod ei interdictum non sit."—*Dig.* lib. l. t. i. 31.

(*b*) "Titio centum relicta sunt ita, *ut a monumento meo non recedat*, vel *uti in illâ civitate domicilium habeat*. Potest dici non esse locum cautioni, per quam jus libertatis infringitur. Sed in defuncti libertis alio jure utimur."—*Dig.* lib. xxxv. t. i. 71, § 2.

(*c*) "Miles ibi domicilium habere videtur ubi meret, si nihil in patriâ possideat."—*Dig.* lib. l. t. i. 23, § 1. *Vide antè* as to meaning of this word *patriâ*, § xxxiii. n. (*k*); § xxxix. n. (*i*).

(*d*) "Relegatus in eo loco, in quem relegatus est, interim necessarium domicilium habet."—*Dig.* lib. l. t. i. 22, § 3.

Officer, Civil or Military, employed in the Public Service of the State (*e*).

1. If the office be conferred for the life of the holder, and irrevocable, the law fixes his domicil in the places where its functions are discharged, and admits of no proof to the contrary. "For the law," says Denisart, "will not presume an "intention contrary to an indispensable duty."

2. If the office be of a temporary and revocable nature, the law does not presume that the holder has changed his original domicil, but allows the fact that he has done so to be established by the usual proof (*f*).

CLII. The authority of Denisart, under the old Law of

(*e*) *Duranton, Cours de Droit Français*, liv. i. tit. iii. (tome i. §§ 361-363) *Merlin, Rép. de Jur.* Domicile III. Du Domicile des Fonctionnaires Publics.

(*f*) "Il y en a dont le devoir indispensable exige qu'ils aient leur domicile dans tel lieu, parce qu'il faut qu'ils s'y trouvent tous les jours et presque à toute heure; tel est le lieutenant civil du châtelet de Paris. Il en est d'autres qui ne sont pas astreints au même devoir, quoiqu'ils aient aussi des fonctions journalières: tel est un trésorier de France. En conséquence, il est impossible que le lieutenant civil du châtelet n'ait pas son domicile à Paris; au lieu qu'il n'est pas impossible qu'un trésorier de France soit domicilié ailleurs que dans la ville où se fait l'exercice de son office. On ne sauroit avoir égard en matière de domicile à une intention contraire à un devoir indispensable. C'est pourquoi quand même un lieutenant civil se diroit, dans tous les actes qu'il passeroit, domicilié dans un château, où il auroit sa femme et ses enfans, il n'en seroit pas moins domicilié à Paris," &c. —*Denisart*, Domicile II. s. 5. This rule applies to those who are comprised under the 107th article of the *Code Civil*, according to which, "L'acceptation de fonctions conférées à vie emportera translation immédiate du domicile du fonctionnaire dans le lieu où il doit exercer ces fonctions." *Merlin* remarks upon the equivocal character of the expression "conférées à vie," which, he says, is designed only to mean "fonctions *irrévocables*."—*Rép. de Jur.* Domicile III. s. 3. [The 106th article is as follows:—"Le citoyen appelé à une fonction publique temporaire ou révocable conservera le domicile qu'il avait auparavant, s'il n'a pas manifesté d'intention contraire." The *Dutch Civil Code* (art. 77), without distinguishing between appointments for life and temporary appointments, provides generally that those who are called to the public service retain their own domicile unless they have manifested a contrary intention.]

France, would seem to warrant a third division, namely, that of those public officers whose service does not compel them to such close residence, but, perhaps, to only half a year's residence or to a residence of alternate months; they, according to the high authority of Denisart, are *presumed* in law to be domiciled at the place of their vocation (*dans le lieu où ils se sont consacrés à des fonctions publiques*): but it is a presumption, capable of being repelled by proof, that the seat of his family affairs, the residence of his wife and family, is elsewhere, and that he has described himself, in all legal instruments, as belonging to his ancient domicil, and not to that which he has acquired by virtue of his employment.

CLIII. The presumption was repelled in the case of *Somerville* v. *Lord Somerville* (*g*). His residence in London, after he had been elected one of the sixteen peers of Scotland, was holden to be no proof of his domicil there being occasioned by his parliamentary duties. So the office of "grand-maître d'eaux et forêts" was not holden to prevent the law of the original domicil from operating in the case of *M. de Courtagnon*, chiefly on the ground that the office did not compel more than a visit of two or three months during the course of the year to the department, and not a fixed residence (*h*).

CLIIIA. In the case of the *Attorney-General* v. *Rowe* (*i*), it was holden that a person whose domicil of origin was English, and who resided in England till his appointment to be Chief Justice of the Island of Ceylon, did not lose his domicil of origin by residing in Ceylon, as Chief Justice, and dying there after four years' service in that office; and that his estate was therefore liable to legacy duty in England.

(*g*) 5 *Vesey's Rep.* p. 787. [See the recent case of *Hamilton* v. *Dallas*, *L. R.* 1 *Ch. Div.* p. 257, in which Vice-Chancellor Bacon decided that Lord Howden, a British peer, was not, because of his duty to attend the House of Lords when required, incapacitated from acquiring a domicil of choice in a foreign country.]

(*h*) *Cochin, Œuvres*, tome iv. p. 52.

(*i*) 1 *Hurlstone & Coltman's Rep.* p. 31.

CLIV. The case of *Mr. Bruce* (*j*) should be mentioned as belonging to the first division. He left Scotland when young, and after being several years in the navy, in the year 1767 went to the East Indies (*k*) in the military service of the Company, and continued there till his death, in 1783, having risen to the rank of major. In many letters to his friends in Scotland he expressed an anxious desire to return and spend the remainder of his life in his native country: particularly he wrote to that purpose a few months before his death, and he was in the course of remitting home his money, meaning soon to follow, when he died. Lord Chancellor Thurlow confirmed the judgment of the Scotch Court, which had pronouuced Mr. Bruce to be domiciled in India, and therefore, by fiction of law, in the province of Canterbury. It was said by counsel, in *Somerville* v. *Lord Somerville*, that "*Mr. Bruce entered into the India* "*service, not the King's service. A great deal turned upon* "*that: for he was bound to reside in India, and could not* "*reside elsewhere except by the leave of the Company, and,* "*consequently, for a temporary purpose.* Therefore, by "entering into that service, he was conceived to have "abandoned his original domicil, and to have gained a "new one. It did not depend upon the place in which "he lived in India. That was not inquired into. It "turned upon his residence in India under an obligation "that was to last during his whole life, unless put an end "to." And it is difficult, upon any other suggestion than that contained in the foregoing remarks, to account for the little weight which seems to have been ascribed to the

(*j*) 6 *Brown's Cases in Parliament*, p. 566. 2 *Bosanquet & Puller's Reports*, p. 230.

(*k*) *J. Voet*, remarking that a domicil is not created when a person "negotiationis exercendæ gratiâ alicubi commoretur," adds, "Quâ ratione responsum quoque aliquando fuit, eum qui in Indiam Orientalem profectus fuit domicilium non amisisse. Quod tamen nostris moribus ex novissimo jure de iis qui Indiam Orientalem petunt, quodammodo mutatum est, ut dicetur in materiâ successionis ab intestato." —Lib. v. t. i. s. 98.

circumstances of birth, declarations of intention, and the absence of any fixed home elsewhere.

CLV. The case of *Munroe* v. *Douglas* (*l*) seems also to fall within this principle. Dr. Munroe was born in Scotland, and educated there to the profession of a surgeon. At the age of nineteen he went out to Calcutta to practise, and in 1771 was appointed assistant-surgeon to a regiment in the East India Company's service. On the 6th of May, 1789, he was appointed full surgeon in the Company's service; in 1811, he was ranked as surgeon in His Majesty's service; but it was only local rank. He was married in India in 1797. In March 1813 he made his will, and added a codicil thereto on the 22nd September, 1814. He left India in January 1815, with a determination, as his widow (the plaintiff) contended from his letters when in India, to spend the rest of his days in Scotland, and arrived in England in the following June, where he took a house, and, owing to ill-health, became undetermined whether he should continue to reside in England, or spend his days in Scotland. In July 1816 he went on a visit to Scotland, and died at his friend's seat there in August 1816. By his will he had given property to his wife to the amount of 1000*l.* a year and upwards, and made dispositions in favour of his nephew and nieces; but he had not disposed of the remainder of his property, amounting nearly to 60,000*l.*; and the question was whether at his death he was to be considered as domiciled in Scotland, or whether he was, as the defendants contended, to be considered as domiciled in England, the distribution of the property being by law much more in favour of the plaintiff in the former case than in the latter. Many letters were given in evidence, written by the Doctor during his residence in India, to show that his determination was to spend his latter days in Scotland, and some passages in his will were relied on as indicative of that intention. Letters also and

(*l*) 5 *Maddock*, pp. 379-406 (A.D. 1820), decided by Sir John Leach.

conversations were in evidence to prove that, after the Doctor's return from England, his health was such that he was doubtful whether he should spend his days in England or Scotland; and clear evidence was adduced that when he went to Scotland after his return from India, it was only on a visit, and without an intention of then permanently residing there. It was very elaborately argued before the Vice-Chancellor. That learned Judge said: "It was settled by the case of *Major Bruce* that *a* "*residence in India for the purpose of following a profession* "*there in the service of the East India Company* creates a "new domicil. It is said that, having afterwards quitted "India in the intention never to return thither, he aban- "doned his acquired domicil, and the *forum originis* re- "vived. As to this point I can find no difference in "principle between the original domicil and an acquired "domicil, and such is clearly the understanding of Pothier, "in one of his passages which has been referred to. A "domicil cannot be lost by mere abandonment. It is not "to be defeated *animo* merely, but *animo et facto*, and "necessarily remains until a subsequent domicil be ac- "quired, unless the party die *in itinere* toward an intended "domicil. It has been stated that, in point of fact, the "testator went to Scotland in the intention to fix his "permanent residence there; but this statement is not "supported by evidence. It has also been stated that "the testator, knowing he was in a dying state, went to "Scotland in order to lay his bones with his ancestors; "but this, too, is clearly disproved. It may be repre- "sented as the certain fact here, that, when this gentle- "man left England on his visit to Scotland, he had "formed no settled purpose of permanent residence there "or elsewhere; that he meant to remain a few months "only in Scotland, and to winter in the south of France, "and with this fluctuation of mind on the subject of his "future domicil, he was surprised by death at the house "of a relation in Scotland. I am of opinion, therefore,

" that Dr. Munroe acquired no new domicil after he " quitted India, and that his Indian Domicil subsisted at " his death. A domicil in India is, in legal effect, a domi- " cil in the province of Canterbury, and the Law of Eng- " land, and not the Law of Scotland, is, therefore, to be " applied to his personal property."

CLVI. The point of the obligation to reside in India being incidental to the holding a commission in the Company's service, as well as the general character of the Anglo-Indian officer, underwent much discussion in 1843, in the Prerogative Court of Canterbury, in which Sir Herbert Jenner Fust delivered the following judgment:—

CLVII (*m*). " The question relates to the domicil which " is to determine on the validity of a paper purporting to " be the will of Colonel J. Craigie, who died on the 23rd " of November, 1840, at Hatchett's Hotel, Piccadilly. " The will is dated in the month of October preceding; " it is in the shape and form of a Scotch deed, a holograph, " subscribed by the deceased, but not attested by any wit- " nesses; and, consequently, as it was made since 1840 [*sic*, " ? 1837] if the deceased is to be considered as a domiciled " British subject, the will is invalid for want of a due attes- " tation; if, on the other hand, he is to be considered as a " domiciled Scotchman, then the Law of Scotland must de- " termine on the validity or invalidity of this paper as a will.

" The question in the present case is not, whether the " Domicil of this person was Indian or English, for the Law " of England and India are now the same, as regards the " validity of wills; whether it was so at the time when the " Act of 1 Vict. c. 26 passed, does not matter in this case, " because an Act was shortly after, January 1838, passed by " the Legislature in India, assimilating the Law of India in " respect to wills to that of England; there is no necessity, " therefore, to consider whether the Domicil was English or " Indian, provided it was not Scotch. This leads the Court

(*m*) *Craigie* v. *Lewin*, 3 *Curteis' Ecclesiastical Reports*, p. 435.

" to enquire into the history of this gentleman. He was born " in the year 1786, in Scotland; his parents were Scotch, " and they also were of Scotch descent; he remained in " Scotland, indeed was never out of that country, until 1804, " when he went to India in the East India Company's " military service, in which he had obtained a commission as " a lieutenant of a regiment of native infantry. By birth, " descent, and genealogy, therefore, his Domicil was clearly " and decidedly Scotch, and he did not abandon that domicil " until he became of age, when he acquired an Indian, or, " as one counsel has called it, an Anglo-Indian Domicil. " Having entered into the service of the East India Company, " and having attained his age of twenty-one whilst in that " service, his Domicil became Indian, or Anglo-Indian; for " it is the same thing. In India he remained until 1837, " with two exceptions: he was in England in 1819 until " 1820, and he was also at the Cape of Good Hope from " February 1824 until October in the same year. On the " first of these occasions, when absent from India, he did not " visit Scotland; it is said, in explanation, that he came to " England on a special mission from the Marquis of Hastings, " the duties of which fully occupied his time. On the second " occasion, when at the Cape of Good Hope, his Domicil " was clearly Indian. During the visit of the deceased to " England in 1822, he married an English lady. I do not " think this fact of any importance; it merely amounts to " this—that, being a domiciled Indian, he married whilst " being on a visit to England: he carried his wife back with " him to India; he had children by her, and he lived in India " from that time until the year 1837, when he came over to " England on the customary leave of absence, but still retain- " ing his commission in the East India Company's service: " he came on a three years' leave of absence, though it is " stated that such leave is renewable for two years more; " so that he had every prospect of remaining in this country " for five years: he applied for renewal of leave of absence " on two occasions, and obtained it; this would have carried

" his leave of absence down to March 1841; he died in " November 1840. Now it is said this leave of absence being " granted as a matter of course, the deceased had every " expectation that before its expiration he should have suc- " ceeded to a commission of full colonel in the service, which " would have precluded the necessity of his returning to " India, to which it is admitted he had a decided aversion. " If he did not return to India on the expiration of his " leave of absence, or previously attain his full rank, he " must have quitted the service of the East India Company " (33 Geo. III c. 55). Now it appears that the deceased " had no intention of abandoning his commission, unless " he became a full colonel; he must, therefore, at this " time, 1837, have contemplated the possibility, if not the " probability, of being obliged to return to India, if only " for a short period. It appears, that on his arrival in " this country, in 1837, after remaining in England a " short time, the deceased proceeded direct to Scotland, " and arrived there in the October of that year, and he " continued in Scotland until August 1839, living, whilst " there, in furnished houses: it further appears that, " during the time of his residence, he contemplated the " purchase of a house in Edinburgh; he wished to take a " lease of a house for seven years, and offered to take such " a lease of a particular house; but it had been purchased " by another party, to whom he offered 100*l.* to give up " the bargain, and not being able to succeed in effecting " his wishes, in August 1839 he quitted Scotland, and, by " the advice of his medical attendant, came to London; " from thence he went to Plymouth, and lived there, or in " that neighbourhood, in furnished houses, until the death " of his father in 1840, when he left Plymouth, and again " went to Scotland to attend his father's funeral; he re- " mained in Scotland until October in that year, when he " returned to London, and died at Hatchett's Hotel in " November 1840, being at the time about to join his wife " and children at Plymouth. This is the statement on

" behalf of those who desire to support the Scotch Domicil;
" on the other side, there is very little difference in the
" statement of the facts, the affidavits scarcely vary the
" case at all; they all coincide in the fact that the de-
" ceased did express an intention of taking up his abode
" in Scotland, in his wish to take a particular house in
" Edinburgh, that he offered 100*l.* to the purchaser of the
" lease to give up the bargain; that as late as 1840, he
" again expressed a wish for the same house, or of pur-
" chasing some other house in the neighbourhood of
" Edinburgh; and that he was desirous of sending his
" son to study with some civil engineer in that neighbour-
" hood. These circumstances are undoubted; from them
" I think the Court can come to the conclusion that if
" everything had turned out according to the deceased's
" own wishes, he would have taken up his residence in
" Scotland: no one can look at his letters without seeing
" that he had a decided preference for the country of his
" birth. Unfortunately his wife had a different opinion;
" she preferred residing in England, and she at last per-
" suaded the deceased that such residence would be better
" for themselves and children. It appears to me, that
" having left Scotland in 1839, he did not go back until
" 1840, and then only to attend his father's funeral, and,
" when that ceremony was over, he returned to England.

" These are the facts of the case, so far as is important
" to the present question; but the Court will have to refer
" more particularly to the exhibits, before coming to a con-
" clusion on the case. Now, I do think that, if all circum-
" stances had combined to favour the deceased's wishes, he
" would have taken up his residence in Scotland: but still
" the question remains, whether there was an abandonment
" of the Indian Domicil, and if there was the *animus* and
" *factum* of a domicil in Scotland. It was properly asked
" by the counsel for Mr. Craigie, When was it that the
" Indian Domicil was abandoned, and the Scotch acquired?
" The answer, or the tenor of the answer, to the question

" was, at the time when the deceased went to Scotland in " 1837, that he then went there for the purpose of remaining ; " in short, that he did it *animo manendi*, with the intention " to preclude all question as to his domicil: that he took " up his residence there *animo et facto*. The question then " remains for the Court to determine—it being an admitted " fact that the deceased went to Scotland in 1837, and " remained there until 1839—whether he went there *animo* " *manendi*. The solution of that question depends very " much on his peculiar situation at the time ; whether he " was in a condition to abandon his acquired domicil in " India—for if he was not in a condition to abandon his " Indian Domicil, the intention, even if to a certain ex- " tent complete by the fact of his having come to this " country *animo manendi*, if he could possibly remain, " would not be sufficient to change the domicil ; if the " deceased was not in a condition to carry his intention " into effect, that is, if his remaining in this country was " dependent on circumstances which might be such as to " render it incumbent on him to return to India, that is, if " certain events did not give him an opportunity of finally " quitting the service. In 1837, when the deceased arrived " in this country, he retained his commission in the East " India Company's service ; he not only came on leave of " absence for a distinct period:—it signifies not whether " there was a greater or less probability, or whether, as a " mere matter of course, his time of absence would be ex- " tended for two years more—he was still absent on leave ; " he retained his commission in the Indian army, his " regiment was in India, and his military establishment " there: he had quitted India only for a temporary " purpose ; not with a fixed determination to abandon it " altogether, but with the intention to return, unless on " the happening of a particular event, namely, his attain- " ing the rank of full colonel, before his leave of absence " expired.

" The question is, whether a person having a fixed domicil

" and having quitted it with the proposed intention of re-
" turning, although such intention may be annulled by the
" happening of a particular event, can by law be said to have
" abandoned that domicil. This is the important part of
" the case: did the deceased, when, in 1837 or in 1839, he
" went to Scotland, go there *animo manendi*, or did he
" merely go there to remain so long as the rules of the
" service in India would permit, and no longer? Now all
" the correspondence and the affidavits tend to show that
" he contemplated returning to India; he might have con-
" tinued to live in Scotland during the whole of the time
" of his leave of absence, but would that have been a resi-
" dence *animo et facto*?—the *animus* would only be whilst
" his absence from India permitted, for if he did return to
" India, his Indian domicil would revert—perhaps I should
" not say *revert*, because it would never have been divested.
" When the deceased came to this country, he quitted
" India on a temporary absence, which might be converted
" into a permanent quitting, by a certain event happening
" in the interval between the time of the commencement
" of his absence and the time for his return. I cannot
" think that the fact that he was absent from India, when
" he was looking to a probable return, can be said to be
" quitting that country *animo manendi* in another: he was
" indeed in another place, but for a temporary purpose
" only. Now, up to 1839, when he last quitted Scotland,
" his domicil was India. I cannot conceive that, by
" having left India under the circumstances mentioned, he
" had divested himself of the domicil acquired by his com-
" mission in the East India Company's service; in 1839,
" he went to Plymouth with his wife and family; he re-
" sided there, although only in furnished lodgings. If the
" question was between a Scotch or an English domicil,
" I should decide for the Scotch domicil, notwithstanding
" his returning to England, and living there in furnished
" lodgings, and although, as has been argued, he had at
" one time expressed a wish to purchase a house near

" Plymouth ; and although his actual residence was so far " in this country, except for a short time when he went to " Scotland on his father's death ; and although he died in " the act of returning thence to join his wife and family " in this country. The important question is, What is " necessary to constitute a change of domicil? There " must be both *animus et factum*; that is the result of all " the cases. This case must depend on its own circum- " stances; the principles on which it is to be determined " are the same in all cases, and that principle extracted " from all the cases is this, 'That a domicil once acquired " 'remains until another is acquired, or that first aban- " 'doned;' I admit all that has been said in this case, that " length of time is not important; one day will be suffi- " cient, provided the *animus* exists: if a person goes from " one country to another, with the intention of remaining, " that is sufficient; whatever time he may have lived there " is not enough, unless there be an intention of remaining.

" It is now my duty to consider the effects of the exhibits, " and of the particular circumstances stated in the affida- " vits, for the purpose of showing the grounds on which the " Court thinks that the deceased had not abandoned his " Indian Domicil: he retained his establishment in India; " his connection with his regiment, of which he remained " lieutenant-colonel, still continued; he was bound by the " rules of the service to rejoin his regiment at the expira- " tion of his leave of absence.

" Now, admitting the fact of actual residence in Scot- " land, from 1837 until 1839, and the wish for a fixed and " permanent residence in Scotland; admitting that the " deceased had a decided preference for Scotland, and that, " if peculiar circumstances did not interfere to prevent " him carrying that inclination into effect, he would have " settled in a house in that country; still he had not at " the time of his death placed himself in such a situation " as to enable the Court to say that he had abandoned his " Indian Domicil, and acquired a permanent domicil in

"Scotland: the deceased had not abandoned his Indian "Domicil, he could not do so without resigning his com- "mission, he did not intend to do so unless he obtained "the rank of full colonel. Although the bias of his in- "clination was to live in Scotland, and even if he had "remained there during all the time he was absent from "India on leave, I should still have held that by retaining "his commission, which might, and probably would, have "compelled him to return to India, the deceased had not "abandoned his Indian Domicil. If so, then can it be "said that he had abandoned that domicil? His connec- "tion with that country, which originally gave him his "Indian Domicil, still remained in full force; it was, in- "deed, liable to be dissolved by his attaining his full rank.

"Looking to all the circumstances of the case, I think "it is distinguished from all those cases which counsel "have most judiciously abstained from going into; they "have all been considered here often and often. I think "the Indian Domicil was not abandoned, but that the de- "ceased was still domiciled in India. If he had died in "Scotland, that would not in the slightest degree have "changed my opinion; he was domiciled in India: if the "question had been, whether he was domiciled in England "or in Scotland, if that point had been *in equilibrio*, the "place of birth and origin might have turned the scale.

"I think there is quite sufficient in this case to enable "the Court to determine that the Indian Domicil, which "the deceased had acquired, did remain at the time of "his death: when I look for the *animus* and the *factum*, I "do not find sufficient to enable me to say that the de- "ceased had dissolved his connection with India; and I "think, under all circumstances, that the Scotch Law "cannot determine on the validity or invalidity of this "will."

CLVIII. The liability to recall preserved the Anglo-Indian Domicil in this case. It is of course possible, however, that the liability may be so remote in any service

that it may be not a practical liability, and this might affect the consideration of Domicil (*n*).

CLIX. The decision in the case of *Ommaney* v. *Bingham* appears to have been founded upon the principle that by entering into the military service of a foreign country you acquire a domicil in that country. The circumstances (*o*) were these. Sir Charles Douglas left Scotland in 1741, at the age of twelve, with a view to enter into the navy. From that time to his death he was in Scotland only four times: 1stly, as captain of a frigate; 2ndly, to introduce his wife to his friends, on which occasion he stayed about a year; 3rdly, upon a visit; 4thly, when, being appointed to a command upon the Halifax station, he went in the mail coach to Scotland, and died there in 1789. He was not for a day resident there in any house of his own. In those circumstances, it was difficult to contend that he retained the domicil during all that time in a country with which he had so little connection. He had no estate there, no mansion-house; he was not a peer of that country (*p*). There was nothing but the circumstances of his birth and his death; and upon those circumstances, and because he had an occasional domicil there, the Court of Session determined that he was domiciled in Scotland. He married in Holland, and had a sort of establishment there; he commanded the Russian navy for about a year, and was afterwards in the Dutch service; he had no fixed residence in England till 1776, when he took a house at Gosport, in which, when on shore, he lived as his home. That was

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(*n*) *Forbes* v. *Forbes*, 1 *Kay's Rep.* p. 64; 16 *Jurist*, p. 642. *Sed vide post*, *Hodgson* v. *De Beauchesne*, 12 *Moore's P. C. Rep.* p. 285; [*et vide Hamilton* v. *Dallas*, *L. R.* 1 *Ch. Div.* p. 257.]

(*o*) *Ommaney* v. *Bingham*, *before the House of Lords*, 18th March, 1796. See argument of counsel in case of *Somerville* v. *Lord Somerville*, 5 *Vesey's Reports*, p. 757.

(*p*) See *Lord Redesdale's Speech on the Strathmore Peerage Case*, for the distinction between the Peer of the Realm and the Lord of Parliament.—4 *Wilson & Shaw's Appeal Cases*, Appendix V. p. 91.

the only residence he had in the British dominions. Whenever he went on service he left his wife and family there, and he always returned to that place. His third wife was a native of Gosport. Before his visit to Scotland, in November 1786, Sir C. Douglas had written to his sister: "Be pleased to observe, that I do not engage to build my "tabernacle in Scotland; and if it should, some time "hence, prove convenient to me to establish myself else-"where, because of service or otherwise, I shall probably "remove the whole of my family," &c. He stayed in Scotland till September 1787, returned to London and Gosport, where Lady Douglas resided; in 1788 he went for some months to Holland; in 1789 he went to Edinburgh alone, and died there two days after his arrival, in furnished lodgings, of an apoplexy. In his will he spoke of his dwelling-house at Gosport. In these circumstances the cause came before the House of Lords. The Lords considered the circumstance of his death in Scotland, going there only for a few days, as nothing. The Lord Chancellor expressed himself to the following effect:—

"The reasons assigned in support of the decision of "the Court of Session are by no means satisfactory. His "dying in Scotland is nothing; for it is quite clear the "purpose of going there was temporary and limited; no-"thing like an intention of having a settled habitation "there. The interlocutor says he had an occasional "domicil there: but the question never depends upon oc-"casional domicil: the question is, What was the general "habit of his life? It is difficult to suppose a case of "exact balance. *Birth affords some argument, and might* "*turn the scale, if all the other circumstances were in æqui-*"*librio*; but it is clear in this case, his circumstances, "his hopes, and sometimes his necessities, fixed him in "England. His taste might fix him at Gosport in the "neighbourhood of a yard, a place also convenient to him "in the pursuit of his profession. Upon his visit to

" Scotland, by a letter he guarded his sister against the " hope of his settling there."

The Counsel in the case had argued that " the words " of the Civil Law, ' Larem rerumque ac fortunarum sum- " ' mam,' cannot be translated better than by the expres- " sion of that letter, that he had no thought of setting up " his tabernacle there : it means the main establishment."

The Counsel further argued that " it became impor- " tant to determine the domicil in that case ; because, by " a codicil, he had imposed a condition in restraint of " marriage upon a legacy to his daughter with a gift over " to other children ; and it was contended that the con- " dition was void by the Law of Scotland, but good by the " Law of England, on account of the gift over. If Sir " Charles Douglas had died in the Russian or Dutch " service, his property must have been distributed accord- " ing to the Law of Russia or Holland ; for he had made " himself a subject of those countries, and by his establish- " ment there had lost his establishment in Scotland." And then Counsel said that " *his original domicil having* " *been abandoned, when he afterwards entered into the service* " *of this country he became domiciled here, as a Russian or* " *Dutchman would on entering into our service.*" This last proposition, though made *arguendo*, appears to me a correct exposition of the law (*q*).

CLX. It was said, indeed, that this case was decided rather with reference to the weakness of the Scotch, than to the strength of the English domicil. Lord Loughborough closed his decision on *Bempde* v. *Johnstone* (*r*) with the following comments on that of *Ommaney* v. *Bingham*.

CXLI. " The case last determined in the House of

(*q*) The doubt expressed in the note, 5 *Vesey's Rep.* p. 782, does not materially affect it. The case of *Curling* v. *Thornton*, referred to, has been, as to this point, long overruled. *Et vide post*, § clxviii., and cases in note.

(*r*) *Bempde* v. *Johnstone*, 3 *Vesey's Rep.* p. 200.

" Lords is the case of *Sir Charles Douglas*. I particularly " had the benefit of hearing all the arguments so well " pressed in this cause, and also at the Bar of the House " in that. It fell to my share to pronounce the judgment, " but it was much more formed by Lord Thurlow, and " settled in concert with him: the general course of the " reasoning he approved. It was one of the strongest " cases; for there was first a determination of the Court " of Session upon the point. Great respect was due to " that. They had determined the point. The judgment " was reversed. It came before the House with all the " respect due to the Court of Session upon the very point, " and under circumstances that affected the feelings of " every one; for the consequences of the judgment the " House of Lords found themselves obliged to give, were " harsh and cruel. . If the particular circumstances, " raising very just sentiments in every mind, could pre- " vail against the uniformity of rule it is so much the " duty of Courts of Justice to establish, there could be no " case in which the feelings would have led one farther. " *Lord Annandale's* case is not near so strong. The habits " of Sir Charles Douglas were military; he had no settled " property; his life had been passed in very different " parts of the world; if the consideration of his Original " Domicil could have had the weight that is attempted " in this case, it would have had much more there; for " there was less of positive fixed residence there than in " this case. At one time he was in Russia, at another in " Holland, and in a fixed situation as commander of a " ship in the Russian and Dutch service. His activity " rendered him not much settled anywhere. It was " necessary to take him where he was found. The cause " had this additional circumstance, that he happened to " die in Scotland, the place of his birth; but, undoubtedly, " he went there for a very temporary purpose, a mere visit " to his family when going to take a command upon the

" American service. That is so strong a case that it " makes it rather improper in me to have said so much."

CLXII. The cases referred to—CLIV. to CLVIII.—were clearly founded upon the peculiar nature of the East India Company's service. As long as a person was engaged in it, he held an irrevocable office, binding him to residence in a certain country.

The principle upon which these cases were decided, though the East India Company has ceased to exist, is still applicable to similar cases (*rr*).

CLXIII. It remains to be considered, whether the domicil of a person employed in the military service of his *own* country is changed when, in the discharge of his functions, he is compelled to reside in a foreign land.

CLXIV. The language of the Roman Law is, " The " soldier would seem to have his domicil in the place " where he serves, if he possess nothing in his own muni- " cipality " (*s*). But it seems clear that if he had had any property in his own municipality he would have been allowed a double domicil, that of his own municipality and place of serving (*t*).

CLXV. In the curious case mentioned by Pufendorf (*u*), respecting the instrument by which the dowry of the wife was confirmed being governed by the law of the husband's domicil, it was said that this domicil, which was in Bremen, was in no way affected by the husband's having served as a soldier in Hamburgh, and having resided there.

CLXVI. The leading foreign case is that of the *Duke*

[(*rr*) There is no analogous Anglo-Chinese domicil. *Tootal's Trusts, L. R.* 23 *Ch. Div.* 532.]

(*s*) "Miles ibi domicilium habere videtur ubi meret, si nihil in *patriâ* possideat."—*Dig.* lib. l. t. i. 23. *Vide sup.* §§ xxxiii., xxxix.

(*t*) *Domat, Droit public*, liv. i. t. xvi. s. 3.

(*u*) " Sed postea maritus militaria stipendia civitatis Hamburgensis meruit ibique habitavit, quamquam hoc facto nondum apparebit domicilium eum mutâsse," &c.—*Pufendorf, Observationes Juris Universi*, Obs. CXXII., Dotem creditoribus hypothecam, &c.

of Guise. This illustrious person, who was, by virtue of his inherited title, the Premier Lay Peer, and, by virtue of the Archbishopric of Rheims, the Premier Ecclesiastical Peer of France, after becoming a member of the famous League (*x*), and signing the Treaty of Sedan, was expatriated, and entered as general into the service of the King of Spain and the Emperor of Austria. During the time of his residence at Brussels, he contracted a marriage, the validity of which depended upon his domicil.

The marriage had been solemnized by the Vicar-General of the Army; but it was especially provided by the Ecclesiastical Law then in force in the Pays-Bas, that the Vicar-General's power (*y*) should cease when the soldier or officer resided in a place where they might be said to have a fixed domicil (*domicilium fixum*), and that, in such case, the soldiers should receive the Sacrament of the Church from the ordinary minister; and that the nobles who returned to their ordinary residence should be emancipated from the control of the Delegate, and placed under that of their Bishop. This last position, D'Aguesseau argued, was decisive against the validity of the Duke of Guise's marriage. "Will it be contended" (said that great jurist) "that Monsieur de Guise had no Domicil, or "that he had it not at Brussels? To say M. de Guise "had no Domicil is *absurdum*; it would be to make the "General of the Armies of the Emperor, and of the King "of Spain, a *vagabond*. To say that his Domicil was not "at Brussels is *absurdius*: all who serve the King of Spain "in Flanders cannot be considered as domiciled elsewhere "than in the capital of the Pays-Bas; as, for example,

(*x*) *Ligue confédérée pour la Paix Universelle de la Chrétienté.*

(*y*) "Similiter omnes nobiles et alii inferiores, qui cessante exercitu habent suos ordinarios in iis partibus, quando subsistunt iis in locis ubi est fixum eorum domicilium, censentur subditi eorumdem locorum ordinariis, etiamsi alioqui habeant officia et stipendia ratione dicti exercitus." This was the article of the Papal brief, upon the construction of which the case principally turned.

" Paris is the reputed Domicil of all the great lords who " have no other in point of fact " (z).

CLXVII. William Macdonald, a native of Scotland, acquired a considerable plantation in Jamaica, where he had resided about fifteen years. In 1779, he was appointed lieutenant in the seventy-ninth regiment of foot, at that time quartered in the island; he also obtained the command of a fort in it. In 1783, he obtained leave of absence for a year, that he might return to Scotland for the recovery of his health. He died a few months after his arrival. The seventy-ninth regiment was by this time reduced. He had no effects in Scotland, and his only property in England consisted of two bills, which he had transmitted from Jamaica before he left it, in order, as was said, to purchase various articles for his plantation. His father intromitted with the funds in England. The rights of the parties turned upon the question, whether William Macdonald had his domicil in Jamaica or in Scotland. It was offered to be proved that the deceased meant to have returned to Jamaica, if his health had permitted, and that he had no intention of residing in Scotland. The Lord Ordinary found the succession was to be regulated by the Law of Scotland, in respect that William Macdonald died in Scotland, his native country, where he had resided several months before his death. A reclaiming petition having been presented, the Court was of opinion that the domicil of William Macdonald was in Scotland, and that the proof offered was incompetent, and therefore unanimously "refused" the petition without answers. Some of the Judges came to be of opinion that the domicil of the deceased was in Jamaica, but a considerable majority retained their former opinion. The ground of this decision, Mr. Burge observed, must have been that his commission in the army necessarily ren-

(z) *D'Aguesseau, Cinquante-Septième Plaidoyer* (A.D. 1700), tome v. p. 448.

dered the continuance of his residence in Jamaica uncertain (*a*).

CLXVIII. The proposition that the officer has the domicil of the State which he serves, applies, of course, equally to the Naval and Military Service. The ship of war is part of the territory of the State (*b*). If the Foreign State possess territories with distinct jurisdiction and laws (*c*), the officer will have his domicil in that subdivision of the State which he serves (*d*).

CLXIX. If the case of Macdonald be compared with that of *Ommaney* v. *Bingham*, it will place the difference between the effect of the general service of the Crown and the particular service of a Company, or of a Foreign State, upon the question of domicil, in a clear light.

CLXX. There had been several cases of military testaments decided in the Prerogative Court of Canterbury under the Wills Act, in which it seems always to have been assumed that the domicil of the officer was unchanged by his serving the Crown in foreign parts (*e*).

But the Judicial Committee of the Privy Council have given a decision upon the question of the domicil of the soldier, which goes a great, if not the entire, way to the proposition, that the domicil of a military person, so long as he continues, whether on half-pay or not, in the service

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(*a*) *Morison's Dictionary of Decisions*, vol. xi. p. 4627, tit. *Foreign*. *Burge's Commentaries on Foreign and Colonial Law*, vol. i. pp. 47, 48.

(*b*) *Vide antè*, vol. i. § ccclxvi.

(*c*) Vol. i. pt. ii. ch. ii.

(*d*) *Ommaney* v. *Bingham*, cited in 5 *Vesey's Rep.* p. 757; *Dalhousie* v. *M'Douall*, 7 *Clark & Finnelly's Rep.* p. 817; *Brown* v. *Smith*, 15 *Beavan's Rep.* p. 444.

(*e*) In the goods of *C. E. Phipps*, officer on service at Berbice, 2 *Curteis' Ecclesiastical Reports*, p. 368. *Whyte* v. *Repton*, officer at New Brunswick, 3 *Curteis*, p. 818. The term "soldier," however, in the clause of exemption in the Wills Act of 1837, has been holden to apply to those engaged in the East India service; in the goods of *Donaldson*, 2 *Curteis*, p. 386.

of the Crown, can never be changed, but must, necessarily, be in England. This decision was mainly founded on the liability, however remote, to be called into active service (*f*).

[From pp. 316 to 319 of the judgment in *Hodgson* v. *De Beauchesne*, and from the three later decisions cited in the note (*ff*), it appears that the domicil (whether original or acquired) of a person entering the naval or military service of the Crown cannot, while that service continues, be changed for another in the territory of any foreign power, but must be in England or in some part of the British dominions, a domicil in which would be compatible with the duties of his service. An intention to change, contrary to duty, cannot be presumed.]

The judgment was also remarkable for a judicial notice of the inapplicability of the *dicta* of Prize Courts, as to the domicil of neutrals and belligerents, to cases of domicil during peace.

Time, which is the great ingredient in the former class of cases, has generally much less and sometimes no weight in the latter class, a distinction too often not adverted to in the decisions of English Courts.

THE AMBASSADOR (*g*).

CLXXI. The most important class of public officers whom the law exempts from the presumption of domicil

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(*f*) *Hodgson* v. *De Beauchesne*, 12 *Moore's P. C. Rep.* p. 285.

[(*ff*) *Ex parte Cunningham*, *L. R.* 13 *Q. B. Div.* p. 418; *Patience* v. *Main*, *L. R.* 29 *Ch. D.* p. 976; *Paxton* v. *Macreight*, *L. R.* 30 *Ch. D.* p. 165.]

(*g*) "Les ambassadeurs, les commissaires départis, les gouverneurs et commandans de provinces, les officiers militaires, et les soldats, n'acquièrent point non plus de domicile dans le lieu où se fait l'exercice de leurs fonctions par la seule résidence qu'ils y font, encore qu'elle soit continuelle, *lorsqu'il est prouvé par d'autres circonstances plus fortes qu'ils ont un domicile dans un autre lieu.*"—*Denisart*, Domicile I. s. 4.

attaching to continuous residence in a particular place, are:—

Ambassadors.—No position of International Law is, as has been shown, better established than that which preserves to the Ambassador in a Foreign State the domicil of the country which he represents. The important legal consequences flowing from this doctrine, with respect to the celebration of marriage and the birth of children, are well known (*h*).

CLXXII. But if a State choose to employ as Ambassador a foreigner domiciled in the State to which he is Ambassador, it is probably a sound proposition of law that *his* domicil is not changed (*i*).

CLXXIII. The privilege of the Ambassador extends to those domiciled in his family, and resident with him, but there is no authority for saying that he can impart it to strangers (*j*).

CLXXIV. *Petreis* v. *Tondear* was a cause of nullity of marriage instituted in the Consistory of London, on the ground that it was not celebrated in the parish church, or in a place where marriages had been usually solemnized according to the provisions of the English Marriage Act. The validity of the marriage was contended for on the

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It would appear from this last sentence, that, according to *Denisart*, the *primâ facie* presumption, even in these cases, was in favour of the *actual* domicil. See *Wheaton's Hist.* p. 245.

"Legatus non est civis noster, non incola, non venit ad nos ut domicilium, hoc est rerum et fortunarum suarum sedem, transferat; peregrinus est qui apud nos moratur ut agat rem principis sui."—*Bynk. de Foro Legat.* c. viii.

(*h*) "Ita legatus etsi per multos, immo plurimos annos cum familiâ suâ degat in aliquâ aulâ, et in urbe domum propriam possideat, non tamen propterea domicilium ibi habet."—*Wolff, Jus Gentium*, c. i. s. 187.

"L'envoyé d'un prince étranger n'a point son domicile à la cour où il réside."—*Vattel*, liv. i. c. xix. s. 218. See also s. 217.

(*i*) *Heath* v. *Samson*, 14 *Beavan's Rep.* p. 441. See vol. ii. § cxxxv. and note, as to the case of an Ambassador being also a subject.

(*j*) *Vattel, Droit des Gens*, liv. iv. c. ix. ss. 117-124.

plea that it had been celebrated in the chapel of the Bavarian Ambassador, which was to be considered as a part of the country to which that Ambassador belonged: the marriage, it will be seen, was not contracted between two English subjects. On the other side, the case of *Heinville* v. *Fierville* was cited, in which a marriage of a minor, solemnized without consent, in the Venetian Ambassador's chapel in 1783, had been set aside by the Consistory of London.

CLXXV. In the course of his judgment Lord Stowell observed: "The principal objection, however, is that this "Act of Parliament will not operate under the circum- "stances of the case; for that the house and chapel are to "be considered as the country of the person residing there "to which our law will not extend. But the authority of "the case which has been cited, sufficiently decides this "question, so as to oblige me to admit this libel. The "party who proceeds was in the suite of the Spanish "Ambassador, and not of the Bavarian; and the other "party, though she has the name of a foreigner, is not "described as being of any Ambassador's family, and has "been resident in this country four months, which is "much more than is necessary to constitute a matrimonial "domicil in England, inasmuch as one month is sufficient "for that under the Act of Parliament. Supposing the "case, therefore, to be assimilated to that of a marriage "abroad between persons of a different country, it is diffi- "cult to bring this marriage within the exception, as this "woman is not described as domiciled in the family of an "Ambassador. Taking the privilege to exist (which has, "perhaps, not been formally decided), I may still deem it "a fit subject of consideration, whether such a privilege "can protect a marriage where neither party, as far as "appears at present, is of the country of the Ambassador, "and where one of them has acquired a matrimonial "domicil in this country, and where it is not shown that "she had been living in a house entitled to privilege

" during her residence in England. On these grounds I " shall admit the libel. The matter may receive further " illustration of facts which may entitle it to further " consideration."

The cause, however, appears to have been discontinued (*k*).

CLXXVI. Mr. Henry quotes the following case and opinion from the *Nieuw Nederland's Advijs Boek*, vol. i. p. 165, as important in its bearing upon the Domicil of Ambassadors (*l*) :—

" A., born at Amsterdam and Dutch Consul at Smyrna, " being about to intermarry with B. at Smyrna, they " both appeared before the Chancellor of the Dutch " nation at that place, and entered into an antenuptial " contract or settlement of their respective property: " some years after the wife dies, leaving two children, and " without having disposed of her half of the joint pro- " perty, which by the settlement she was entitled to do. " One of the children died soon after the mother at " Smyrna: the question was, under the law of which " place, whether of Smyrna or Amsterdam, the wife's " share should be regulated or disposed of."

CLXXVII. On this the following opinion was given: " The undersigned, having considered the case proposed " and the question arising therefrom, is of opinion (under " correction) that, since A. was born at Amsterdam, and " only residing at Smyrna in the service of the Govern- " ment, he must be considered as still residing at Amster- " dam: since it is clear in law that, by residence in a " foreign country under a commission, especially when " this is only for some years and not perpetual, no " Domicil is contracted; the reason of which is evident, " namely, that to the constituting of a fixed Domicil, it is

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(*k*) 1 *Haggard's Consistory Reports*, p. 139. See *Ruding* v. *Smith*, 2 *ibid.* p. 386.

(*l*) *Odwin* v. *Forbes*, *Henry's Rep.* Appendix, p. 204.

" not sufficient that a person resides in this or that place, " but that he must have the intention at the time, of " making it his fixed and permanent abode during his " life, according to Voet, *ad tit. Dig. de Judiciis et ubi* " *quisque*, no. 97 *et* 98; and even were a man to remain " ten or more years in a place, still he cannot be " said to have had there his fixed Domicil, so long as " it was considered by him as a temporary residence " (*mansio temporaria*), as by example in a commission; " whence it follows, that the marriage celebrated by A. at " Smyrna, the place of his residence, so far as concerns " the community of profit and loss during this marriage, " must be considered as having taken place at Amsterdam, " according to the doctrine of *Goris in Advers. Jur. Tract.* " 1. *De Societate Conjug.* cap. vi. n. 4, 5, 6, *et* 9, where he " shows also that this has been so decided in Portugal. " With him also agrees Van Wezel, *De Connub. Bonorum* " *Societ. Tract.* 1. n. 100, where he says, that a native " of Utrecht being in Friesland, whether under com- " mission from his State or not, and there marrying, must " be considered to have married in the community of " goods, notwithstanding that community by marriage in " Friesland does not extend beyond the use of the goods, " and by no means over the goods themselves; which is " also confirmed by Van Someren, *De Repræs.* c. iii. s. 13, " and *De Jure Noverc.* c. iii. § 4; see also Bergandas, *Ad* " *Consuetud. Fland. Tr.* 2. n. 11, 12; and no wonder, " since it is an indisputable rule that a wife follows the " dignity of the domicil, and the forum of her husband, " according to the *lex* 65, *Dig. de Judiciis et ubi quisque.*

" So, as we have before shown, the aforesaid Consul A. " must be considered as yet dwelling at Amsterdam, his " birth-place; hence it follows that this marriage must be " held as contracted according to the custom which has " prevailed of old in Holland, by which, so soon as the " marriage is celebrated, a community of goods is induced " and takes place, not only with respect to the property

" possessed by the parties respectively at the time, but " also all future acquired property; which effect of mar- " riage, by the custom of Holland, can only be avoided " by an express antenuptial contract, *disertis verbis*. " Therefore, as the succession of foreign Ministers, and " consequently of their wives, must be regulated accord- " ing to the law of their domicil, as Professor Voet " shows under the title of the *Digest. Senat. Consult.* " *Tertull.* nu. 34; so he cites in support of this doctrine a " case taken from the 3*d Hollandsche Consultatien*, Consult. 4, " whereby it appears that a certain married woman having " died at Utrecht while residing there with her husband, " a Hollander by birth, who was the Dutch Commissary " at Munster, she must be considered as having died in " Holland, and therefore the succession in her goods must " be regulated according to the custom of Holland; and " also by the 113th Consult. of the *Nederland's Advijs Boek*, " bk. iii. p. 268, it appears that a deputy from the pro- " vince of Guelderland to the States-General having died " intestate at the Hague, after several years' residence " there, in that office, he was not understood to have lost " his original domicil by this residence, and his property " was divided between his widow and children, according " to the custom of Guelderland; and furthermore, as it " appears that one of the said children of this marriage " is dead, leaving the said A., his father, him surviving, " the said parent is by the law of Holland entitled to the " half of this child's share in his mother's property; nor " can it be objected that this child was born and died at " Smyrna, since this child according to law must be held to " be born and have had his fixed domicil at the birth-place " of his father, viz. at Amsterdam, according to Grotius, " in his Introduction to the Law of Holland, lib. ii. part " xxvi. n. 4, who says that in such cases, in Holland, is " followed the law of succession of the place where " the deceased child's parents had their fixed domicil, " which in this case, as we have seen, was, and is yet, the

" city of Amsterdam; for this father of the child did " not withdraw himself from this city of his own will, in " order to choose another domicil, but only on account of " his office and commission; and in this case no one, " however residing at another place, is said to change his " domicil.

" Thus advised at Leyden, 6th July, 1731."

CLXXVIII. Mr. Henry likens the case of the party in this opinion to that of *Somerville* v. *Lord Somerville*, which has been already referred to, considering the former a strong confirmation of the latter, and expresses his surprise that no mention should have been made in the discussion of that case of the law in the Digest, which gave to senators a domicil (*m*) in the city where they exercised their functions while it retained their Domicil of Origin, upon the principle that the dignity conferred on them was rather an addition to than a diminution of their existing Domicil.

CLXXIX. So, under both the ancient and modern Law of France, it has been holden that the peerage does

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(*m*) " Senatores licet in urbe domicilium habere videantur, tamen et ibi unde oriundi sunt habere domicilium intelliguntur, quia *dignitas* domicilii adjectionem potius dedisse quam permutasse videtur."—*Dig.* lib. i. t. ix. 11.

J. Voet, in commenting on this text, remarks, " Nam et senatores Romanos domicilii jus in municipio unde oriundi retinuisse antea dictum est; adeo ut in urbe domicilium magis *habere viderentur* quam re verâ haberent."—*Comm. ad Pandectas*, lib. v. t. i. s. 98.

This passage does not appear by the report to have been specifically cited, but it was argued, that " his residence for the purpose of parliamentary duty, on being elected one of the sixteen Peers of Scotland, in 1790, according to *all the law on the subject*, would have no effect."

According to the Canonists, the Senator was domiciled at the place where he exercised his functions.

" Senator etiam aut aliter quivis officialis perpetuus alicujus principis quamvis ejus loci in quo senatoriam exercet dignitatem minimè sit civis (*ex text. in* l. civis, Ccd. de Incolis, lib. x. t. xxxix.), domicilium tamen illic acquirere tenet *Anna* filius rescribens," &c. &c.—*Barbosa de Officio et Potestate Episcopi*, Alleg. iv. s. 34.

not give the domicil of the capital and residence of the court to the person ennobled by it (*n*).

CLXXX. The Consul, in the case cited from Mr. Henry's work, does not appear to have been engaged in the trade of the country where he exercised his functions, or to have been a native of that country; otherwise the law would have taken a very different view of his domicil.

CLXXXI. In the case of *the Indian Chief* (*o*), the law is most clearly laid down by Lord Stowell. "I am" (he said) "first reminded that he was American Consul, "although it is not distinctly avowed that his consular "character is expected to protect him: nor could it be "with any propriety or effect, it being a point fully esta- "blished in these Courts that the character of consul does "not protect that of merchant united in the same person. "It was so decided in solemn argument, in the course of "the last war, by the Lords, in the case of *Mr. Gildermester*, "the Portuguese Consul in Holland, and of *Mr. Eykellen-* "*burg*, the Prussian Consul at Flushing. These were again "brought forward to notice in the case of *Mr. Fenwick*, "the American Consul at Bordeaux, in the beginning of "this war, on whose behalf a distinction was set up in "favour of American Consuls, as being persons not usually "appointed, as the Consuls of other nations are, from "among the resident merchants of the foreign country, "but specially delegated from America, and sent to "Europe on a particular mission, and continuing in "Europe principally in a mere consular character. But "in that case, as well as the case of *Sylvanus Bourne*,

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(*n*) "La seule qualité de duc et pair ne donne point de domicile à Paris, lieu reconnu pour être celui de la demeure du roi, parce qu'elle n'exige point une résidence habituelle auprès de sa Majesté." So decided, *Merlin* says, is the case of the Prince de Guémené, 1670; and to the edition of 1826 he adds this note: "Il n'y a plus de duchés-pairies, mais la même décision paraît devoir être appliquée aux pairs de France actuels."—*Merlin, Rép. de Jur.* Domicile III. s. 4.

(*o*) 3 *C. Rob. Adm. Rep.* p. 29.

"American Consul at Amsterdam, where the same dis-
"tinction was attempted, it was held that, if an American
"Consul did engage in commerce, there was no more
"reason for giving his mercantile character the benefit
"of his official character than existed in the case of any
"other Consul. The moment he engaged in trade the
"pretended ground of any such distinction ceased; the
"whole of that question therefore is as much shut up and
"concluded as any question of law can be" (*p*).

Consuls sent from the State of their domicil to represent that State in a foreign country are not ordinarily considered to have acquired a domicil in that country; but in certain circumstances they may acquire a domicil in it (*q*).

In the case of the *Attorney-General* v. *Kent* (*r*)—S., a Portuguese subject, who had resided many years in England as agent for a wine company, was appointed attaché to the Portuguese embassy; he continued to reside in England, and died there, still holding the office of attaché. There was no evidence of his ever having visited Portugal or communicated with any one in Portugal; but in his will he stated that as he was a foreigner who always intended to return to his country, and was moreover an attaché, his property was not subject to legacy duty. It was holden, first, that he had acquired an English domicil before he became attaché; secondly, that his appointment as attaché did not revive his domicil of origin; and that therefore his personal property *was liable to legacy duty.*

CLXXXII. It may here be observed that the Domicil of Origin is not changed, either by residence in the house of the Ambassador, or within the lines of an army

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(*p*) See too *Maltass* v. *Maltass*, 1 *Robertson's Eccl. Rep.* p. 79; *Gout* v. *Zimmermann*, 5 *Notes of Cases*, p. 440.

(*q*) *Sharp* v. *Crispin*, *L. R.* 1 *Probate and Divorce*, p. 611. *Heath* v. *Samson*, 14 *Beav.* p. 441.

(*r*) 1 *Hurlstone & Coltman's Rep.* p. 12.

quartered in a foreign country, or by remaining on board any vessels (*s*) of the native country.

CLXXXIII. The Ambassador is allowed to retain the domicil of his own country, because he is the representative of his Sovereign, and it should seem that the same privilege would be, *a fortiori*, extended to the Sovereign himself, if such an occasion should occur for its application. What, for instance, would have been considered the domicil of James the Second of England, or of Charles the Tenth of France, during the later years of their respective lives? It has been stated that the English domicil of Henrietta Maria was strongly contended for on the ground of her being an integral part of the Royal Family of England (*t*).

VII. NECESSARY DOMICIL—THE ECCLESIASTIC.

CLXXXIV. The Domicil of the beneficed Ecclesiastic has been always holden to be the spot in which his benefice is situated. Neither the bishop nor the *curé* was considered to have changed the domicil of his benefice by the exercise of his functions at the residence of the King or of independent Sovereign companies. The longest possible absence "from the diocese or the parish, "from whatever cause or with whatever intention, was "holden insufficient to effect a change of domicil" (*u*).

CLXXXV. On this principle the testaments of bishops, under the old French law, were ruled by the custom prevailing in their diocese. Canons, however, and members of an ecclesiastical corporation, were not bound by so strict a rule, because their functions could be supplied by others, and they were under no obligation to a continual

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(*s*) 1 *Vattel*, liv. i. c. xix. ss. 216–17.
(*t*) *Antè*, § xliii.
(*u*) *Denisart*, Domicile II. s. 6.

residence (*w*); and, therefore, if a canon held an office in some independent Sovereign company, which did require continual residence (*x*), his domicil was considered to be in that place and not where his canonry was (*y*).

VIII. NECESSARY DOMICIL—THE PRISONER.

CLXXXVI. By the law of all European countries, the prisoner preserves the domicil of his country.

CLXXXVII. In a case tried before the Judge of the Prerogative Court in Ireland (Dr. Radcliffe), the deceased party, about whose domicil a discussion arose, had been an Irishman by birth, where he had also resided, and had property, as he had, however, in England, where he died in prison. The learned Judge observed, "Now, how does "he describe himself in both wills, as well that relied on "by the impugnant as that by the intervenient? Not as "late of Wrexham or Hammersmith, or, generally, as of "any part of England, but as late of the city of Dublin, "in Ireland, but then a prisoner in the King's Bench "Prison. It could not be supposed that he acquired a "domicil in England, by residence within the rules or the "walls of the King's Bench Prison; all such residence goes for nothing" (*z*).

(*w*) "Le vrai domicile d'un évêque est dans le chef-lieu de son diocèse, quand même il passerait une grande partie de l'année à Paris ou ailleurs."—*Merlin, Rép. de Jur.* Domicile III. s. 6.

(*x*) "Tertio modo habito respectu ad ordines suscipiendos quis subjectus est episcopo diœcesis, in quâ beneficium ipse habet, et potest ab illo ordinari, seu ab alio de ejus licentiâ, quamvis alias ei alio modo subditus non sit. Clericus enim habet domicilium, et est civis illius diœcesis in quâ situm est ejus beneficium, dum illud possidet."—*Barbosa*, Alleg. 14, s. 42.

(*y*) The functions, however, which the celebrated Abbé Dubois performed at Paris were not considered to be of this class, and his domicil was pronounced to be at Beauvais.

(*z*) *Burton* v. *Fisher*, *Milward's Reports of Cases in the Prerogative and Consistorial Court of Dublin*, pp. 191–2. The learned Judge sustained this position by reference to the rule of Roman Law, and to

IX. NECESSARY DOMICIL—THE EXILE.

CLXXXVII. With respect to the Exile, there would appear to be two conflicting texts of the Roman Law, one promulgating "that the relegated person had in the place "of his relegation a necessary domicil *ad interim*;" the other, "that he could have a domicil in the place from "which he was relegated" (*a*).

CLXXXIX. It is justly, however, observed by Merlin, that the conflict between the two laws is to be reconciled by recollecting that there were two kinds of relegation known to the Roman Law: 1, temporary; 2, perpetual; and that it is quite clear that the latter text cited applies only to the former of these punishments (*b*). Even the

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the case of the Marquis of Annandale, *Bempde* v. *Johnson*, 3 *Ves.* 198. But with submission to the learned Judge, the latter case cannot be said to "decide that a residence in any place by constraint operates nothing in a question of domicil," however true that position may be. Lord Annandale had been confined in England as a lunatic during the latter part of his life, and the Lord Chancellor's remark is, "I am not clear that the period of his lunacy is totally to be discarded."

"L'exilé ni le prisonnier ne sont jamais présumé avoir perdu l'esprit de retour, quelque temps qui se soit écoulé depuis le moment où ils ont été privés de leur liberté. Ils conservent par conséquent le domicile qu'ils avoient alors."—*Denisart*, Domicile I. s. 3.

(*a*) "Relegatus in eo loco in quem relegatus est, interim domicilium necessarium habet."—*Dig.* lib. 1. t. i. 22, § 3, Ad Municipalem. "Domicilium autem habere potest et relegatus in eo loco unde arcetur, ut Marcellus scribit."—*Ibid.* 27, § 3. See also lib. xlviii. t. xix. 17, § 1, De Pœnis: "Item quidam ἀπόλιδες sunt, hoc est sine civitate, ut sunt in opus publicum perpetuo dati, et in insulam deportati, ut ea quidem quæ juris civilis sunt, non habeant, quæ vero juris gentium sunt, habeant." By "jus gentium" is meant "Private" not "Public International Law."

(*b*) Compare, too, the reasoning of *Barbosa*—"Relegatus retinet domicilium in eo loco ubi habitat relegationis causâ ex text. quem ad hoc clarum suspicor *in l. filii liberorum*, sec. *relegatus ff. ad municip.* cujus verba sunt: Relegatus in eo loco in quem relegatus est, interim domicilium habet; ad quod dicendum impellet dict. illa, *interim*, verboque illo *necessarium*, nam quamvis post quæsitum domicilium mutari possit, attamen dum quæritur et retinetur, abesse debet animus ab eo

temporary exile would, under that law, have been holden to have a fixed domicil in the place of his relegation, though still to have preserved his Original Domicil.

CXC. The French jurists, however, have no doubt that, for the purposes of testamentary succession, his Original Domicil would be alone considered. Acting on this interpretation of the Roman Law, they classed persons condemned for a term of years to the galleys in the same category with respect to their domicil as people absent on a long voyage, and therefore considered them as retaining the Domicil of Origin.

CXCI. It is equally clear, in spite of two sentences passed during the time of the French Revolution to the contrary, that the person banished (*c*) for life (*déporté*), whether for a civil or political offence, loses his Original Domicil. It cannot be doubted that the same sentence would be passed in England [if the penalty of transportation for life were again put into force].

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discedendi, et ideo destinatus animus illique permanendi adesse dicitur, prout requiritur ad quærendum domicilium, ut supra dicitur. Non tamen obliviscar Ulpiani auctoritatem *in l. ejus qui manumissus sec. final. ff. ad municip.* quâ probatur relegatum domicilium retinere eo loci unde arcetur habere, ubi *gloss. ultim.* exponendo illa verba *unde arcetur*, dicit, id est, in quo : sed hujusmodi Ulpiani responsio nullam affert contrarietatem cum Paulo Jurisconsulto in *d. sec. relegatus*; rejectâ enim glossæ distinctione dicentis in perpetuo relegato planum esse quod in dicto sec. *relegatum* asserit Paulus Jurisconsultus alios non ita, quasi insinuat tunc procedere Ulpiani dictum; tenendum igitur est relegatum domicilium habere eo loci unde arcetur, scilicet ab eo unde trahit originem, et in eo loco in quem relegatus est, excluså denique intelligentiâ de exulatu in perpetuum, propter dictionem, *interim*, de quâ in *d. sec. relegatus*, de quo tamen *vide Petr. Greg. in Tract. de Beneficiis*, cap. 36, num. 20. *Campanil*, d. cap. 8, num. 25." —*Barbosa de Officio et Potestate Episcopi*, Alleg. IV. s. 35.

(*c*) *Merlin, Rép. de Jur.* Domicile IV. "Relegatus integrum suum statum retinet, et dominium rerum suarum, et patriam potestatem, sive ad tempus, sive in perpetuum relegatus sit. Deportatio autem ad tempus non est."—*Dig.* lib. xlviii. t. xxii. 18. The præses had, latterly, power given him to *interdict* a person *domiciled* in his Province, not merely from the Province, but also from his place of origin.

X. NECESSARY DOMICIL—THE EMIGRANT.

CXCII. The Fugitive from his country on account of civil war is holden not to have lost his intention of returning to it, and therefore still retains his domicil in his native land (*d*).

CXCIII. This proposition was fully established in France towards the beginning and about the middle of the last century, with respect to the English who followed the fortunes of James the Second after his abdication. "The "English" (says Boullenois) "who, following King James "the Second, sheltered themselves in France, have been "maintained in their laws; they may make wills, as to

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(*d*) *Mascardus*, after stating the ordinary presumption of law, remarks: "Præterea illud sic velim limites, ut non procedat, quando quis aliquo metu impulsus, res familiamque suam alibi transtulerit: non enim ibi durante metu domicilium contraxisse præsumitur: ita decisum fuit a *Pet. de Ubald. in d. tract. de Cano. Episcop. et Paroch.* c. vii. *vers. octavo, quæritur post num.* 9. ubi quæstionem illam diremit, Parochianus est quidam nescio cujus Ecclesiæ in rure sitæ, quæ in cujuspiam civitatis dominatu erat: hic bello hostiumque immanitate quæ ibi flagrabat, coactus, unâ cum domesticis et supellectili, ne sibi aliqua vis inferretur, domicilium mutavit, illique commigravit Parochiæ, quæ in illâ erat urbe constructa. Hic, dum mors immineret, cuidam tertiæ Ecclesiæ nescio quid legavit ibique se humari elegit. Quæro igitur cum in parochiâ parochialis Ecclesiæ in illâ urbe positæ decesserit, cui parochiali Ecclesiæ canonica debeatur? Debebiturne parochiali Ecclesiæ constitutæ in civitate ubi ille mortuus est, an véro parochiali Ecclesiæ sitæ ruri, cujus moriens erat Parochianus? Debebitur profecto canonica parochiali Ecclesiæ rurali, *etenim cum e rure discesserit ob hostium metum, non desiit esse parochianus Ecclesiæ rusticanæ: nec domicilium mutâsse præsumitur, et si omnino cum suis in urbem sese contulerit, cum eo consilio a villâ non abierit, ut perpetuò urbem incoleret, quod nimirùm requiritur ut censeatur domicilium mutâsse*," &c. &c., citing *Ulpian*, *Paul*, and *Caius*.—*De Probationibus*, Concl. DXXXV., ss. 26–29, vol. i. p. 522.

"Hanc tamen decisionem intelliges" (says *Mascardus*, referring to the passage last cited), "ut procedat quando durante metu rus non se contulerit, verum secus esset, si postquam metus cessaverit in urbe remanserit: tunc enim mutâsse rurale et urbanum domicilium elegisse præsumitur," &c.—*Ibid.*

"the form (*e*), as it is practised in England, and their "wills, clothed with this formality, are esteemed valid in "France."

CXCIV. It is of course possible that the Prisoner, the Exile, the Emigrant, or the Fugitive, may, by continuing to reside in a country after the coercion has been withdrawn, and after his power of choice has been restored to him—like the minor who resides in a place after his minority has ceased—acquire a domicil therein.

CXCV. Both these points were considered in a case which, in the year 1838, was brought before the Prerogative Court of Canterbury.

CXCVI. The facts of this case (*f*) were thus stated by the Judge (Sir Herbert Jenner), "That the deceased, Guy "Henri du Vol, Marquis de Bonneval, died at the age of "seventy-one, on the 22nd of September, 1836, in Norton "Street, Fitzroy Square (London); that the will in question "was made in the English form, and was executed for the "purpose of disposing of the property in England alone, "being confined simply to that; that he also made a will "in 1826, at Paris, by which he disposed of his property in "France, and that he thereby constituted the Vicomte de "Bonneval, his nephew (son of the party before the Court, "the Comte de Bonneval), sole and universal heir; that "the deceased was born in France, in 1765, of French "parents, and continued to reside there till 1792, when "he left that country in consequence of the Revolution; "that his parents were of high rank, and that he succeeded "to estates in France, and was President à Mortier in the "Parliament of Normandy; that on his leaving France, "in 1792, he proceeded first to Germany, and afterwards "to England, and continued to reside here till 1814 or

(*e*) *Le Traité de la Réalité et Personnalité des Statuts*, tome i. tit. ii. c. iii. See also *Denisart*, Anglais V. Both cited (*Collectanea Juridica*, vol. i. p. 329) in *Monsieur Target's Opinion on the Duchess of Kingston's will.*

(*f*) *De Bonneval* v. *De Bonneval*, 1 *Curteis' Eccl. Rep.* p. 856.

"1815, during which time he received an allowance from "the government of this country as a French emigrant; "that, on the return of the Bourbons, he repaired to "France, and it is stated, on behalf of his brother (who "asserts the French Domicil), that the deceased went to "France in 1814, and that, on the escape of Buonaparte "from Elba, he came again to this country, but returned "to France in 1815; that from 1815 (according to the "statement of the brother) he continued to reside in "France, occasionally visiting this country, till 1821, when "he became entitled to certain property, under the will of "his aunt, including the château and estate of Soquence, "in the district of Rouen, and, in 1823, he succeeded to "part of the estate of his mother; that from 1814 to "1827 he was actively engaged in the settlement of his "property and family affairs in France; that he agreed to "purchase of his brother part of his paternal property, "which had been confiscated under a decree of the French "Government, and to part of which property he was en- "titled. It is further stated that, in the deed of purchase "of these estates in 1827, made at Paris, the deceased is "described as 'residing usually at the château of So- "'quence,' and that, in a decree of the Court of Appeal at "Caen, he is described as 'living on his rents, and domi- "'ciled in the commune of Sahurs, district of Rouen.' "The act on petition goes on to state that, in 1825, the "deceased received compensation as a French emigrant "for the property confiscated at the Revolution, and that, "from 1815 to 1821, he resided on his property in France, "and took up his domicil in the château of Soquence, and "maintained it till his death; that from 1815 to 1821 he "made occasional visits to England, and in 1821 he took "a house in Norton Street, in which he resided when he "came to England, but that such visits (which is not "denied by the other side) were interrupted for several "years together; that, in 1834, he came to England, but "with the intention of returning again to France; that

"he was rated as proprietor of the property at Soquence "to the electoral contributions of the district; that he "exercised his political rights as a French subject, and "constantly described himself, and was described in legal "proceedings, as domiciled in France, and there are entries "in the Register of Mortgages at Rouen, from 1827 to "1836, in which he is so described; that the deceased "was a Marquis of France, and by the will of 1826, dis- "posing of his property in France, he directs his nephew, "out of certain estates in France, to form a *majorat*, to "serve as an endowment to the title of hereditary Marquis, "granted to their ancestors about 1680, and to settle the "same upon the heirs male of their name, by order of "primogeniture and proximity to the elder branch. These "are the grounds upon which the brother contends that "the deceased was domiciled in France, and, consequently, "that the validity of the will must be determined by the "law of that country.

"On the other side, it is alleged that the deceased came "to this country in 1793, and that, with certain exceptions, "he ever after resided here, down to the time of his death; "that in June 1814 the deceased took the lease of a house "in Mortimer Street, Cavendish Square, for the term of "eight years; and in 1820 he took the lease of another "house in Norton Street for forty-four years, for which he "paid 360*l.* premium, and a rent of 40*l.* per annum, putting "himself to considerable expense in fitting up and furnish- "ing the house, which he continued to occupy till his death, "keeping up an establishment of servants there, and spoke "of the house as his 'home.' The act denies that on his "return to France he was generally, or principally, resident "there from 1814 to 1821, and alleges that in 1821 he had "no house in France, but went there merely to visit his "friends and relations, and to obtain compensation for his "losses; that after he became entitled to the château and "estate of Soquence in 1821, he was involved in lawsuits "in France, which he was compelled frequently to visit,

"passing considerable portions of time there; and, in "order to give validity to acts done there, he was obliged "to describe himself as of a certain residence in that "kingdom; but, from 1834 to the time of his death, he "continued permanently to reside in this country without "paying a single visit to France, though not prevented "from doing so by ill-health, or by any other circum- "stance than his uniformly avowed preference for a resi- "dence in this country; and that, in 1834, the name of the "deceased was included in the list of persons entitled to "vote at the election of members of Parliament for the "borough, and that he at all times kept his property in "England wholly distinct from his property in France. "In the reply, it is alleged that the deceased kept up an "establishment at Soquence, and that, at his death, a "correspondence, consisting of about 1200 letters, dated "from 1818 to 1835, and from different persons and places, "was found at his château at Soquence, carefully pre- "served and classed, and that the family papers and plate "were deposited there; that the house in London was "kept for his convenience when here, and in case of new "disturbances in France, of which he expressed fears; "and that he exercised in France the political rights of a "French subject."

CXCVII. The learned Judge then referred to the principles of law laid down in *Somerville* v. *Lord Somerville*, and continued—"Applying these principles to the case "now to be decided, there is no doubt that the Domicil of "Origin of the deceased was France—for there he was "born, and continued to reside from 1765 to 1792; and "he left that country only in consequence of the disturb- "ances which broke out there. He came here in 1793; "but he came in the character of a Frenchman, and re- "tained that character till he left this country in 1814— "for he received an allowance from our government as a "French emigrant. Coming with no intention of per- "manently residing here, did anything occur while he

" was resident here to indicate a contrary intention? It " is clear to me that as, in the case of exile, the absence " of a person from his own country will not operate as a " change of domicil, so, where a party removes to another " country, to avoid the inconveniences attending a resi- " dence in his own, he does not intend to abandon his " Original Domicil, or to acquire a new one in the country " to which he comes to avoid such inconveniences. At all " events, it must be considered as a compulsory residence " in this country: he was forced to leave his own and was " prevented from returning till 1814. Had his residence " here been in the first instance voluntary; had he come " here to take up a permanent abode in this country, and " to abandon his Domicil of Origin—that is, to disunité " himself from his native country—the result might have " been different. It is true, that he made a long and " continued residence in this country; but I am of opinion " that a continued residence in this country is not suffi- " cient to produce a change of domicil: for he came here " avowedly as an emigrant, with an intention of returning " to his own country as soon as the causes ceased to " operate which had driven him from his native home. " He remained a Frenchman; and if he had died during " the interval between 1798 and 1815, his property would " have been administered according to the law of France.

" Up to 1814, then, he had not acquired a domicil in " this country; the connection with his native country " was not abandoned: from whence, then, is the Court to " collect that he had at any time acquired a domicil in " this country, by any act manifesting an intention to do " so? I can find no fact beyond the mere residence in " this country till 1814, and his taking the lease of a " house for eight years, which would be a strong fact to " show intention, if followed up by a continued residence " here. But what is the fact? In 1814 the Bourbons were " restored; and, as he returned to his own country after " taking this house, the inference is that he did not intend

" to reside here, but took the house with a view of securing " a residence of his own if he should be forced to return " hither: and it turned out that his apprehensions were " not ill-founded. He remains in France during the " greater part of the interval between that time and 1821. " It is alleged that he was employed during these visits in " settling his family affairs, and it has been argued that " his return to France was not in order to resume his " French Domicil, an argument which might have some " force if he had lost his French Domicil. But the " question is, had he abandoned his French Domicil? I " am of opinion that he had not abandoned his French " Domicil, nor acquired one in England, up to 1814 or " 1815."

CXCVIII. The learned Judge proceeded to observe that there was no evidence as to the period from 1815 to 1821, during which he resided in England; and that the evidence with respect to the periods of time during which the deceased resided in England and France respectively, was very loose: but it was proved that he left England in 1828, and resided entirely in France for three years and a half, and that he was again absent from England for eight months, and that in a contract for the sale of some property, he was described as "residing usually at the château de " Soquence, near Rouen;" and that between 1830 and 1834, he had been frequently seen to proceed up the river by the steamboat to Rouen. The learned Judge concluded with these observations: " Now, under the cir- " cumstances, it appears to me that there is no evidence " to show that the deceased ever acquired a domicil in " this country. I see nothing but the fact of the taking " of the lease of a house in Norton Street in 1820, for a " long term undoubtedly, but which does not appear to " denote anything more than an intention of providing a " place of occasional residence in this country. But up " to 1820, he had acquired no domicil here, and during " the subsequent time he was absent in France for several

" years; there is nothing, therefore, to show that he had " abandoned his Original Domicil, and taken up his *sole* " Domicil (for that is the expression used in *Somerville* v. " *Lord Somerville*) in this country, although he kept two " female servants in this country: yet—when I find that " he kept an establishment at Soquence; that he had " plate and furniture worth 1,200*l.*; that his family papers " and his correspondence were deposited there, the letters " classed and arranged;—his having a house here can " have been only for an occasional residence in England, " even if he divided his residence between the two countries, " or even if he spent the greater part of his time here: " but all the evidence as to his continual residence in this " country is that he resided here from 1834 to 1836; " though it does not appear that he did not intend to " return to France. I do not consider that in this case, " any more than in *Somerville* v. *Lord Somerville*, the " declarations made by the deceased at different times, " that he preferred a residence in this country, can be a " ground upon which the Court is to rest its judgment; " the domicil cannot depend upon loose grounds of this " sort, where there are documents which show that the " party looked to France as his home. Unless the evi- " dence was nicely balanced, the Court would pay no " regard to such declarations, showing a preference for a " residence in this country, and not a decided intention " to abandon his native land, and take up his residence " here."

CXCIX. The Court having then alluded to the circumstance of the deceased's description in legal documents —of his having exercised political rights in France—of his being a registered voter in England—of his refusing contribution to certain French rates (concerning which no judicial decision had taken place),—proceeded, " I am, " therefore, of opinion that the deceased continued a " domiciled French subject to the time of his death, and, " consequently, that the validity or invalidity of his will

" must be determined by the French tribunals, and not by " this Court " (*g*).

CC. This point of residence under constraint *as an exile*, seems to have been quite applicable to the succession to the goods of Henrietta Maria, which is mentioned in another part of this work.

XI. NECESSARY DOMICIL—CORPORATION.

CCI (*h*). The definition of Domicil which has been given above, and every other definition, is founded upon the habits and relations of the natural man; and is therefore, of course, inapplicable to the artificial and legal person whom we call a Corporation.

It is, nevertheless, necessary, for the purposes of justice, that an artificial domicil should be assigned to this artificial person, and one formed on the analogy of natural persons.

In most cases there is a clear and palpable connection between the territory and the legal person, *e.g.* municipalities, churches, hospitals, colleges, and the like.

More difficulty arises in the case of companies and societies, formed for the purpose of carrying on commerce and traffic, to which it is difficult to assign a definite seat, as in the case of traffic carried on by means of steamboats, railways, and electric telegraphs, which may be connected with and pass through different territories, as every Rhine steamer, and almost every German railway, does: and in

(*g*) The practice of the Court in these cases is thus stated :—" The precise form in which the Court must pronounce its sentence is this: That the deceased, at the time of his death, was a domiciled subject of France, and that the Courts of that country are the competent authority to determine the validity of his will, and the succession to his personal estate; and, as in the case of *Hare* v. *Nasmyth* (2 *Addams*, p. 25), the Court suspends proceedings here, as to the validity of the will, till it is pronounced valid or invalid by the tribunal of France."

[See *The Lauderdale Peerage*, *L. R.* 10 App. Ca. p. 692.]

(*h*) *Savigny*, *R. R.* viii. s. 354.

these cases, one of two things must happen—viz. either a domicil must be specified in the charter of their constitution (*i*), or the court which exercises jurisdiction with respect to it must determine, by artificial rules, which is the central point of the enterprise (*j*) and make that the domicil.

CCII. The leading English case upon this point is the *Carron Iron Company* v. *Maclaren* (*k*). It was a question of domicil for the purposes of jurisdiction. The case travelled through the Rolls Court to the House of Lords; and the result of it seems to be that a company, according to English Law, may have two domicils for the purposes of jurisdiction; but that such a domicil cannot be created by the agency of a person who has no concern whatever in the management of the affairs of the company, although he be employed in selling its goods. The doctrine of Principal and Agent had more influence on this decision than the ordinary rules of Domicil (*l*). By a later judgment (1872) of the Court of Queen's Bench, it has been ruled that a Foreign Corporation carrying on business in England, although not incorporated according to English Law, may be sued as defendants in an English Court, in respect of a course of action which arose within the jurisdiction (*m*), and that service of the writ on the head officer of the English branch of the business is a proper service.

(*i*) This has been done in the case of various Prussian and Saxon Railways.—*Savigny*, *R. R.* viii. s. 354, note *g*.

(*j*) "Der Mittelpunkt der Geschäfte; le centre de l'entreprise." *Ibid.* s. 354.

(*k*) 5 *H. L. Cases*, p. 416.

(*l*) *Maclaren* v. *Stainton*, 16 *Beav.* p. 279.

(*m*) *Newby* v. *Van Oppen and the Colt's Patent Firearms Manufacturing Company*, *L. R.* 7 *Q. B.* p. 293.

In this case the *law* laid down by Lord St. Leonards, in the *Carron Iron Company* v. *Maclaren*, as to there being two domicils for forensic purposes, one here, and one in the foreign country, is approved of. In the case of the *Princess of Reuss* v. *Bos* (*L. R.* 5, *Eng. and Ir.* App. p. 176), the House of Lords held that an association might be registered as a joint-stock company in England and thereupon incor-

In America (U.S.) a Corporation may be sued by service on its agencies in States other than that of its creation—though, as a general rule, it has no legal existence out of the State by which it is created. A corporation created in one State of the American Union can make no valid contract in another State without the sanction, express or implied, of the latter; and hence laws restricting or prohibiting the exercise of legal rights by Foreign Corporations are constitutional (*n*).

[The ownership by Companies, registered in England under the Companies Acts, of railways, docks, gas factories, and other works of a public nature, situate in foreign countries, has much increased within the last quarter of a century. Such companies have their offices and their boards of direction in London, but their undertakings wholly on foreign soil. It has been decided that they are so far domiciled in England as to bring them under the jurisdiction, though not exclusively, of the English courts, even in an action on a contract made in the foreign country and relating to immoveable property lying within that country (*o*).]

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porated by English law, though the seven shareholders who made the application were resident abroad. The first directors nominated were foreigners, only one having even a temporary residence in England, and the main objects of the Company were to be carried into execution abroad; and it was ruled that upon such a registration the usual effects would follow, and the Company might be wound up like any ordinary English company.

(*n*) *Wharton*, § 48 a, and cases there cited. [*Vide infrà*, § ccclxxxv. B, note as to alien corporations in the United States.]

[(*o*) *Buenos Ayres and Ensenada Port Railway Company* v. *Northern Railway Company of Buenos Ayres*, *L. R.* 2 *Q. B. D.* p. 210. In this case the property lay within the Argentine Republic. Cf. the Civil Code of that State, lib. i. secc. i. tit. vi. art. 3 :—"El domicilio de las corporaciones, establecimientos, y asociaciones autorizadas por las leyes ó por el Gobierno, es el lugar donde está situada su direccion ó administracion, si en sus estatutos ó en la autorizacion que se les dió, no tuviesen un domicilio señalado." Art. 4 treats of subsidiary establishments which have a domicil for local purposes.

See *Lindley on Partnership*, Appendix I.]

CHAPTER XII.

DOMICIL OF CHOICE.

CCIII. It remains to consider the Domicil of Choice, which may be conveniently considered under the question of Change of Domicil, the subject of this chapter.

CCIV. It may be taken as a general maxim of European and American Law (*a*) that every person *sui juris* is at liberty to choose his domicil and to change it according to his inclination.

CCV. An exception to this rule was made, in the time of Grotius, with respect to the subjects of Russia (*b*); but the laws of that country, with respect to naturalization, allegiance, and nationality, matters closely connected with domicil, have undergone a great change since 1864 (*c*).

(*a*) "Nihil est impedimento quo minus quis, ubi velit, habeat domicilium quod ei interdictum non sit."—*Dig.* lib. 1. t. i. 31, Ad Municip. "Domicilium re et facto transfertur non nudâ contestatione sicut in his exigitur qui negant se posse ad munera ut incolas vocari."—*Ibid.* 20. "Incola jam muneribus publicis destinatus, nisi perfecto munere, incolatui renuntiare non potest."—*Ibid.* 34. "Non tibi obest, si cum incola esses, aliquod munus suscepisti, modo si antequam ad alios honores vocareris domicilium transtulisti."—*Code*, lib. x. t. xxxix. 1, De Incolis. *Vide antè.*

(*b*) *Grotius* says, *De Jure Belli et Pacis*, lib. ii. c. v. s. 24: "Solet hic illud quæri, an civibus de civitate abscedere liceat, veniâ non impetratâ. Scimus populos esse ubi id non liceat, ut apud Moschos: nec negamus talibus pactis iniri posse societatem civilem, et mores vim pacti accipere. Romanis legibus, saltem posterioribus, domicilium quidem transferre licebat: sed non eo minus qui transtulerat municipii sui muneribus obligabatur. Verum in quos id constitutum erat, ii manebant intra fines imperii Romani: atque ea ipsa constitutio specialem spectabat utilitatem tributariæ præstationis."

(*c*) See note at the end of this chapter.

CCVI. According to the Roman Law, if the change of abode were made to avoid discharging the offices, or paying the taxes of the place of domicil, two things were required —one that the change of domicil should be real and *bonâ fide*; another, that it should have been made before the nomination to the office or the assessment of the tax had taken place.

CCVII. Questions as to change of domicil may be classed under two divisions,—1. Change of Domicil from one town or one province to another within the same country; 2. Change of Domicil from one country to another. But as the same principles apply to both, it will be convenient to consider them together.

CCVIII. Whenever the facts and circumstances are such as to beget a doubt whether a domicil has been acquired or not, recourse must be had to probable conjectures (*d*) (*conjecturæ probabiles*); and though all cases must in a great measure be dependent on their particular circumstances, yet it is most important to bear in mind that the opinion of jurists and the decisions of Courts of Justice have impressed a character upon certain circumstances, as affording the best criteria of Domicil, as legal presumptions of the intention of the party deduced from his acts. "In "allegations" (says Lord Chancellor Cottenham) "de- "pending upon intention, difficulties may arise in coming "to a conclusion upon the facts of any particular case;

(*d*) "Quoties autem non certo constat ubi quis domicilium constitutum habeat, et an animus sit inde non discedendi, ad conjecturas probabiles recurrendum, ex variis circumstantiis petitas, etsi non omnes æquè firmæ, aut singulæ solæ consideratæ non æquè urgentes sint, sed multum in iis valeat judicis prudentis et circumspecti arbitrium."—*J. Voet*, lib. v. t. i. s. 97. *De Judiciis*, &c. "Plusieurs lois romaines énonçaient diverses circonstances comme signes caractéristiques de domicile."—*Duranton*, tome i. § 354. See, too, the speech of the Avocat-Général in the case of Mademoiselle de Choiseul.—"Mais comment connaître le fait de l'habitation réelle; comment avoir des preuves de la volonté? &c. &c. Les juges ne peuvent donc en décider que par des *conjectures*."—*Denisart*, Domicile, II. s. 1.

"but those difficulties will be much diminished by keeping "steadily in view the principle which ought to guide the "decision as to the application of the facts" (*e*). In the case of *Moorhouse* v. *Lord* (*f*), Lord Cranworth said, "In "order to acquire a new domicil—according to an expres- "sion which I believe I used on a former occasion, and "which I shall not shrink on that account from repeating, "because I think it is a correct statement of the law—a "man 'must intend *quatenus in illo exuere patriam*' (*g*). "It is not enough that you merely mean to take another "house in some other place, and that, on account of your "health or for some other reason, you think it tolerably "certain that you had better remain there all the days of "your life. That does not signify; you do not lose your "domicil of origin, or your resumed domicil, merely be- "cause you go to some other place that suits your health "better, unless, indeed, you mean, either on account of "your health, or for some other motive, to cease to be a "*Scotchman* and become an *Englishman*, or a *Frenchman*, "or a *German*. In that case, if you give up everything "you left behind you, and establish yourself elsewhere, "you may change your domicil. But it would be a most "dangerous thing in this age, when persons are so much "in the habit of going to a better climate on account of "health, or to another country for a variety of reasons— "for the education of their children, or from caprice, or "for enjoyment—to say that by going and living else- "where, still retaining all your possessions here, and "keeping up your house in the country, as this gentleman "kept up his house at *Clippens*, you make yourself a "foreigner instead of a native. It is quite clear that that "is quite inconsistent with all the modern improved views "of domicil" (*gg*).

(*e*) *Munro* v. *Munro*, 7 *Clark & Finnelly's Rep.* p. 877.
(*f*) 10 *House of Lords Cases*, p. 283 (A.D. 1863).
(*g*) *Whicker* v. *Hume*, 7 *H. L. Cas.* p. 159.
[(*gg*) See *In re Marrett*, *L. R.* 36 *Ch. D.* p. 400.]

CCIX. The circumstances which appear principally to be relied upon as affording evidence of the intention (*animus manendi*) are the following.

CCX. 1. Place of Birth and Origin.
2. Oral and Written Declarations.
3. The Place of Death.
4. The Place of Wife and Family.
5. The House of Trade.
6. The depository of Family Papers and Memorials.
7. The Mansion House.
8. Description in Legal Documents.
9. Possession and exercise of Political Rights and Privileges.
10. Possession of Real Estate.
11. Length of residence and lapse of Time (*h*).

(*h*) *New Law of Domicil and Naturalization of Russia.* Imperial Ukase, dated March 6, 1864.

(*Extract from Letter from Lord Napier, H.M.'s Minister at St. Petersburg.*)

St. Petersburg, March 30, 1864.

My Lord,—An Act has recently received the sanction of the Emperor, and been published in the Russian papers, regulating the position of foreigners claiming to obtain certain rights in this country. The law will no doubt be shortly inserted in the *Journal de St. Pétersbourg* in French. I beg to submit to your Lordship at present the substance of the measure :—

A. (1.) A foreigner must be domiciled in the Empire before he can be admitted as a Russian subject.

(2.) A foreigner wishing to become domiciled in Russia must inform the Governor of the Province in which he wishes to reside of his desire to do so, explaining the nature of his occupation in his own country, and the pursuits he purposes to follow in Russia. On the receipt of such declaration the petitioner is considered to be domiciled in Russia, but will nevertheless be accounted a foreigner until he shall have taken the oath of allegiance.

(3.) Foreigners already resident in Russia, distinguished in art, trade, commerce, or in any other pursuit, may prove their domiciliation by other means than those specified in § 2.

(4.) A foreigner, after being domiciled five years in Russia, may apply to be admitted to Russian allegiance.

(5.) Foreign married women cannot become Russian subjects without their husbands.

(6.) The allegiance when sworn to is merely personal, and does not affect children, whether of age or minors, previously born. Those born after the adoption of Russian nationality are acknowledged as Russians.

(7.) Specific rules to be observed in petitioning the Minister of the Interior to be admitted to Russian allegiance (documents and declarations required, &c.).

(8.) It is optional with the Minister to grant the above petition or not.

(9.) An oath to be taken.

(10.) Mode of taking oath.

(11.) In special cases the period requisite to constitute a domicil may be shortened.

(12.) Children of foreigners, not Russian subjects, born and educated in Russia, or if born abroad, yet who have completed their education in a Russian upper or middle school, will be admitted to Russian allegiance, should they desire to do so, a year after they shall have attained their majority.

(13.) The children of foreigners wishing to become Russian subjects will be admitted on the same terms as their parents.

(14.) Foreigners in the Russian military or civil service, or ecclesiastics of foreign persuasions, will be admitted to Russian allegiance without period of domicil.

(15.) A Russian subject marrying a foreign husband, and therefore considered a foreigner, may on the death of her husband, or in case of her divorce, return to her former allegiance.

(16.) The children in the above case are treated as in § 12.

(17.) Foreign women marrying Russian subjects, and the wives of foreigners who have become Russian subjects, are admitted as Russian subjects without taking oath of allegiance. Widows and divorced wives retain the nationality of their husbands.

(18.) Special enactments relative to colonists, foreign agricultural labourers, Bulgarians, &c., remain in full force.

(19.) Foreigners admitted to Russian nationality are placed, in respect to their rights and obligations, on a perfect equality with born Russians.

(20.) Provides for the speedy transaction of business in connection with the adoption of Russian nationality.

B. Transitional measures.

(1.) Foreigners who shall have already adopted Russian nationality may return at any time to their former nationality on payment of all claims against them, whether Government or private.

(2.) Those who throw off their Russian allegiance may either quit

the country or remain in Russia, enjoying equal rights with other foreigners. They must provide themselves with national passports within a year, if resident in European Russia or belonging to a country in Europe, or within two years, if residing in Siberia or having to obtain such passports in any other quarter of the globe. On the lapse of those dates without production of passport, the foreigner must either leave the country or resume his Russian nationality.

(3.) Exception in cases of deserters and Asiatics.

(4.) Annuls all enactments compelling Russian women married to foreigners to sell their immoveable property in Russia, with the exception of certain kinds of property which, as foreigners, they still have no right to possess. With respect to the enactment concerning the payment of three years' dues and export duties by foreigners wishing to leave their Russian nationality, that law is abrogated in respect to those countries which shall adopt a reciprocity on such matters.

C. Abrogating law by which a foreigner was obliged to take an oath of allegiance prior to his marriage with a Russian woman, and by which he was required to ask permission of the Emperor to contract marriage with a Russian woman of the orthodox faith.

I have, &c.

To Earl Russell, K.G. NAPIER.

CHAPTER XIII.

CRITERIA OF DOMICIL.—I. PLACE OF ORIGIN.

CCXI. THE Domicil resulting from Origin is to be distinguished, as has been already observed, from the accidental place of birth, which affords a much fainter kind of presumption (*a*). The place of Origin continues to be the Domicil until it be changed either by those who have the power to change it, as in the case of pupilage, or by a party *sui juris*.

CCXII. The doctrine of the Civil Law is explicit: "Let "each person follow the origin of his father;" that is, each person legitimately born; for the doctrine is equally explicit that "whoever has no lawful father, his first "origin is deemed to be from his mother" (*b*).

CCXIII. In *Bruce* v. *Bruce* (*c*), the first case of Domicil brought before the House of Lords, Lord Chancellor Thurlow said: "A person's Origin, in a question of Where is his "Domicil? is to be reckoned as but one circumstance in "evidence which may aid other circumstances; but it is an "enormous proposition that a person is to be held domiciled "where he drew his first breath, without adding some-"thing more unequivocal." And in *Bempde* v. *Johnson* (*d*), Lord Chancellor Loughborough said that he laid "the least

(*a*) *Guier* v. *O'Daniel*, 1 *Binney's* (*Pennsylvanian*) *Rep.* p. 349. *Marsh* v. *Hutchinson*, 2 *Bosanquet & Puller's Rep.* p. 219.

(*b*) "Exemplo senatorii ordinis patris originem unusquisque sequatur."—*Cod.* lib. x. t. xxxi. 36. "Ejus qui justum patrem non habet, prima origo a matre."—*Dig.* lib. l. t. i. 9.

(*c*) Note to *Marsh* v. *Hutchinson*, 2 *Bosanquet & Puller's Rep.* p. 231.

(*d*) 3 *Vesey's Rep.* p. 198.

" stress " upon the place of birth taken alone; though, in conjunction with the place of education and connection, it had great weight: and in the case of *Ommaney* v. *Bingham*, alluded to in the House of Lords, in 1793, in *Somerville* v. *Lord Somerville*, " birth affords some argu- " ment; and might turn the scale, if all the other cir- " cumstances were *in æquilibrio* " (*e*).

CCXIV. In *Somerville* v. *Lord Somerville* the Master of the Rolls observed: " The third rule I shall extract is, " that the Original Domicil, or, as it is called, the *Forum* " *Originis* or the Domicil of Origin, is to prevail until the " party has not only acquired another, but has manifested " and carried into execution an intention of abandoning " his former domicil, and taking another as his sole " domicil. I speak of the Domicil of Origin rather than " that of Birth: for the mere accident of birth at any " particular place cannot in any degree affect the domicil. " I have found no authority or dictum that gives, for the " purpose of succession, any effect to the place of birth. " If the son of an Englishman is born upon a journey in " foreign parts, his domicil would follow that of his father; " the Domicil of Origin is that arising from a man's birth " and connections " (*f*).

(*e*) *Vide antè*, § clix. " Interim inficias haud eundum, quin in dubio unusquisque domicilium in ipso potiùs originis loco, quam alibi præsumatur habere: cum enim ab initio jus domicilii a patre in filium translatum sit, atque ita filius secutus sit domicilium habitationis paternæ, consequens est, ut is, qui id mutatum contendit, hoc ipsum probet; cum in eodem statu res unaquæque mansisse credatur donec contrarium demonstratum fuerit."—*J. Voet*, lib. v. t. i. s. 92.

(*f*) 5 *Vesey's Reports*, p. 786. See, too, *De Bonneval* v. *De Bonneval*, 1 *Curteis' Ecclesiastical Reports*, p. 863.

" Quando ignoratur origo alicujus, an scilicet sit hujus vel illius civitatis et loci, præsumitur esse illius in quâ fuit alitus et educatus," was the opinion of *Bartolus*, in opposition to that of *Andreas Alciatus*, and is adopted by *Menochius*, *De Præsumptionibus*, lib. vi. præs. XXX. nu. 25. *Alciatus* gave his opinion, " civem illius civitatis aliquem præsumi in quâ habitare reperitur," *eod.*; and this is considered the *first* presumption, however slender, by modern Courts of Justice.

CCXV. The leading case in English Law upon the question of the preponderating influence of Origin, where the scale is nearly equally balanced between two domicils, is the case of *Somerville* v. *Lord Somerville*, which has just been mentioned.

CCXVI. Lord Somerville's father was born in Scotland, and died domiciled in that country. Lord Somerville, the son, was born in Scotland, and at the age of nine or ten years was sent into England, remained a year at Westminster School, and was sent from thence into France, to complete his education. In 1745, he entered the army as a volunteer, and was present at the battles of Preston Pans and Culloden. In 1763, he left the army and resided at Somerville House, in Scotland. He then went abroad; returned in 1765, on account of his father's illness, and after his father's death in that year, stayed about six months longer in Scotland, and then came to London, and manifested an intention to reside a considerable part of the year in London, also to keep up his establishment in the family mansion in Scotland, and divide, as nearly as possible, the year between each residence. It was holden by [Sir R. Pepper Arden,] the Master of the Rolls, after a most elaborate and protracted argument, that the Domicil of Birth had never been abandoned, that Lord Somerville died, as he was born, a Scotchman. In this case, the Domicil of Origin was also the seat of his principal establishment.

CCXVII. In the valuable opinions, or rather decisions, of Grotius, and other Dutch lawyers, upon questions of Domicil, selected by Mr. Henry, in his Appendix to the case of *Odwin* v. *Forbes* (*g*), is the following:—Titius, whose Domicil of Origin was Hanover, lived for some time (probably less than ten years) at Hamburg, making that place the centre of his mercantile transactions: from Hamburg he betook himself to Paris, and after living there a short time, he died, a bachelor and intestate. It appeared, among

(*g*) Page 185.

other things, that he had made no declaration of intending to change his Domicil of Origin, and that he had exercised no rights of citizenship at Hamburgh, where his moveable property was found at his death. It was decided, that his Domicil of Origin had never been lost, and that his property must be distributed according to the law of Hanover.

CCXVIII. In the American case of *Catlin* v. *Gladding* (*h*), a person had abandoned his original domicil and citizenship, but afterwards returned to the home of his mother's family; and the circumstance of birth was holden material by that eminent jurist, Judge Story, as fixing the required domicil.

CCXIX. Lord Stowell says (*i*), "It is always to be "remembered, that the native character easily reverts, and "that it requires fewer circumstances to constitute domicil "in the case of a native subject than to impress the national "character on one who is originally of another character;" but the acquired domicil must be *finally* abandoned before the Domicil of Origin can revert (*k*).

CCXX. In the case of *Chiene* v. *Sykes*, determined by Sir W. Grant in 1811, the facts of the case were these:—Robert Chiene was born at the Scotch town of Crail and was a natural child. He was educated at Crail, residing with his mother. At about eighteen years of age he went to sea; he returned to Crail in the year 1784, spent a twelvemonth on shore, and then resumed his occupation as a seaman. He returned to Crail in the year 1802, and resided there till his death, which happened in November of that year. It appeared that, some years before his death, he had caused to be purchased for him and his brother a dwelling-

(*h*) 4 *Mason's Circuit Court Rep.* p. 308.

(*i*) *La Virginie*, 5 *C. Rob. Adm. Rep.* p. 99. "The sin of the old character is revived," he observes in *The Phœnix*, 3 *ibid.* p. 191. The necessary caution as to applying the authorities of cases in the Prize Courts has been already pointed out. *Note to Munroe* v. *Douglas*, 5 *Maddock's Reports*, p. 394.

(*k*) *Craigie* v. *Lewin*, 3 *Curteis' Eccl. Rep.* p. 405. [See *King* v. *Foxwell*, *L. R.* 3 *Ch. D.* p. 518.]

house, gardens, and some other property at Crail, which had previously belonged to their father. At first he rented a house at Crail, in which he resided for some months, and afterwards removed to the one he had purchased, after it had undergone some repairs, and resided therein till his death. It further appeared that he had married a person who lived in Philadelphia; but had written letters, from which his own intention of residing at Crail was to be inferred. The Master to whom the question was referred, found that Chiene was domiciled in Scotland. The Domicil of Origin was, perhaps, the prominent feature in this case; but the seafaring life of the individual must not be lost sight of as a fact of considerable significance.

CCXXI. So in the leading American case of *Guier* v. *O'Daniel* (*l*), the Judge, after observing that Guier was a seafaring man, says, "Employments of the most opposite "character and description may have the same effect to "produce a domicil. A man may be alike domiciled, "whether he supports himself by ploughing the fields of "his farm, or the waters of the ocean. It is not exclu- "sively by any particular act that a domicil is acquired; "but by a train of conduct manifesting that the country "in which he died was the place of his choice, and, to all "appearance, of his intended residence. The sailor who "spends whole years in combating the winds and waves, "and the contented husbandman, whose drowsy steps "seldom pass the limits of his farm, may, in their different "walks of life, exhibit equal evidence of being domiciled "in a country. Every circumstance in the conduct of old "Guier and his son Thomas, taking into view the unsettled "life of the latter, affords the fullest proof that they were "both domiciled in Delaware. If the proof be stronger "in either case, it is in the case of Thomas, who, though "employed in traversing the globe from clime to clime, "constantly returned to Wilmington, the source and centre

(*l*) 1 *Binney's* (*Pennsyl.*) *Rep.* p. 349, note.

" of his family, the seat and abode of his friends and con-
" nections. His ' heart untravelled ' appears to have been
" universally fixed on the spot to which he was attached
" by the strongest ties of interest and the strongest obli-
" gations of social duty, and never for a moment to have
" pointed a wish to any other country " (*m*).

CCXXII. The inference from both these cases is strongly in favour of the Domicil of Origin, where the person is one who " occupies his business on the great waters ; " and, in *Abington* v. *Barton* (another American case), it was said, " A seafaring man, having lands occupied by himself " or his servants, or hired people, although frequently " absent on long voyages, has always been considered as " having his residence on his lands, and as not losing his " domicil by following his profession " (*n*).

CCXXIII. The old French Law inclined greatly in favour of the Domicil of Origin, and required the concurrence of a number of circumstances to establish the fact of a transference of domicil.

CCXXIV. Mademoiselle Clermont de St. Agnan (*o*) had her Domicil of Origin in Maine. After the death of her mother, she came to Paris in 1742 ; there she had an hotel, a Swiss, her other servants, her furniture, her papers ; she paid the capitation tax, and enjoyed the privilege of a citizen with respect to the rights of receiving goods free of municipal duties : kept Easter there (*elle y fit ses Pâques*). But she was in the habit of passing the summer (*la belle saison*) on her property at St. Agnan ; and, as in various municipal acts she was described as domiciled in Maine, although she had resided nineteen years in Paris, where she died in 1761, she was judicially declared to have preserved her Original Domicil.

CCXXV. In the following opinion it was holden by

(*m*) See also *The Phœnix*, 3 *C. Rob. Adm. Rep.* p. 189.

(*n*) 4 *Mass. Rep.* p. 312.

(*o*) *Traité du Domicile et de l'Absence, par A. T. Desquiron*, s. 36, p. 71. *Denisart*, Domicile, I. s. 5.

the Dutch jurists that a person residing out of the Domicil of Origin, but only with the intention of carrying on trade there, is understood still to retain his domicil in his birth-place. The case was as follows: Cornelius Van Leeuwen, born a citizen of Utrecht, of which place his father and mother were also citizens, was, at the age of fourteen, sent to Spain to be instructed in commerce and the office of a factor, where he remained ten years, without however taking a house, or forming any domestic establishment, but merely boarding and lodging. However, on his return from Spain, he had, in order to preserve his right of citizenship at Utrecht, taken a room there and kept up fire and light as required by the custom. He afterwards died intestate at Amsterdam, but his body was removed to Utrecht, and interred there. On the question, as to which place was to be considered as his domicil, De Witt gave the following opinion:—"The undersigned having "considered the above case, and the question thereout "arising, it seems (under correction) that the aforesaid "Cornelius Van Leeuwen must be considered to have had "his domicil at Utrecht, and to have only peregrinated "to Amsterdam for the sake of trade; and, since he was "buried at Utrecht (*p*), although he died at Amsterdam, "he must be presumed to have wished to preserve his "domicil *in loco originis*, so long as it does not appear "that he had altered it *cum animo manendi*; and that also "by dwelling in another place, *extra locum originis*, a man "is not understood to have changed his domicil, except "such dwelling is done with the intention or will to remain "there without a wish to return again *ad locum originis*; "since a domicil is only acquired by acts, and cannot be "had otherwise than by the disposition shown to continue "the dwelling there, or make it a permanent residence; "and a man is understood only to live at a particular place,

(*p*) Most probably by his direction, but it does not appear in the case.

"and not to found his domicil in that spot, who only "resides there, though for several years, for the mere "purpose of trade or business, or to effect any particular "object, and by such dwelling or residence no *domicilium* "*civitatis* or *incolatus* is acquired. Elbert Leoninus (*q*) "(*Consil.* 54. *circa* n. 2), when he speaks of foreign mer- "chants residing at Antwerp for the purposes of commerce, "'tradens pro regulâ domicilium non contrahi ex solâ "'habitatione negotiandi causâ factâ.' Since, therefore, "the intestate has not shown any disposition to change "his Domicil of Origin at Utrecht, which appears, by "presumption in law, until the contrary is shown, that, "on his return from Spain, he rented a room there, "and kept up fire and light; and that he took no house "at Amsterdam—he must, although he died there, be con- "sidered as having his domicil at Utrecht" (*r*).

CCXXVI. To the same effect was a decision of the Cour de Cassation in France, in the case of *General Destaing*. The question was, whether that officer at the time of his death in Paris was domiciled at that place or at Aurillac, where he had been born and undeniably domiciled for the greater part of his life. The question was tried first before the *Tribunal de Première Instance de la Seine*, and that Court decided in favour of the domicil at Paris, on the ground that the General had not resided at Aurillac for fifteen years; that he had resided at Paris for some months previous to his decease; that he had many times manifested an intention of fixing his principal establishment there, and of purchasing a house for that purpose; so that there was *animo et facto* a change

(*q*) Many authorities are cited for each proposition in this opinion, which I have been compelled to omit.

(*r*) *Odwin* v. *Forbes*, Appendix, pp. 201-3. See too *J. Voet*, *Ad Pandectas*, lib. xxxviii.; *Ad Senat. Tertul.* s. 34 (tom. ii. p. 597); where this case is cited.

["Het sterfhuis van een overledene wordt geacht daar te zijn, alwaar de overledene zijne woonplaats gehad heeft."—*Dutch Civil Code*, tit. iv. art. 80.]

of domicil. But the *Cour de Cassation* reversed this judgment, principally on the ground that the facts alleged were not sufficiently distinct and positive to counterbalance the presumption in favour of the Domicil of Origin at Aurillac (*s*).

CCXXVII. The legal presumption in favour of the Original Domicil was also very strongly illustrated in a recent case brought by appeal from the Scotch Courts to the House of Lords (*t*). It was an action of declaration of legitimacy, brought by the appellant, Mary Munro, for the purpose of establishing that she was the lawful daughter of Sir Hugh Munro, of Fowlis, and as such the heiress in entail entitled to succeed to the estates of Fowlis. Sir Hugh succeeded to the baronetage and estate on the death of his father in 1781; he attained his full age in 1784; he took an active share in the management of his own estates, and was frequently an attendant at the sittings of the town council at Fortrose, to which he was admitted a member soon after becoming of age. In 1785, 1787, 1788, he visited the continent, but always returned to Scotland, where he resided not at the family mansion, Fowlis Castle, but at Ardullie, a house belonging to his mother. He resided with her till 1794, when, in consequence of some disagreement with her, he left Scotland, professedly on a short visit to London. In November of that year he became acquainted with a Miss Mary Law, in London; he took apartments for her in Bolsover Street, Fitzroy Square, and there on the 14th of May, 1796, the appellant was born. He afterwards took a house, on lease, in Gloucester Place, Portman Square, where he and Miss Law resided together till 1801. In September of that year he married her at the parish church of St. Marylebone, according to the form of the ritual of the Church of England. He continued to reside in England for some

(*s*) *Desquiron, Traité du Domicile*, p. 53.
(*t*) *Munro* v. *Munro*, 7 *Clark & Finnelly's Rep.* p. 842.

months after his marriage, but then broke up his establishment in Gloucester Place, and went to Scotland, and there introduced his wife and daughter to his friends and connections. In August 1803, Lady Munro and two female attendants were drowned while bathing on the shore near Fowlis Castle. Rumours having been afloat that Miss Munro was under a legal incapacity to succeed as heiress to the entailed estates, the suit for declaration was brought to determine that question. The majority of the Scotch Judges pronounced her illegitimate. The Lord President thought the domicil of the father did not fix the *status* of the child; and was also of opinion that if it did, then the domicil was altogether English; and therefore the child was indelibly impressed by the law of England with illegitimacy. Six of the other Judges thought the child legitimated by the subsequent marriage on the ground that the domicil was Scotch. Six others thought the domicil was English, and, therefore, that the appellant was illegitimate: from the decree of illegitimacy Miss Mary Munro appealed to the House of Lords.

CCXXVIII. Lord Chancellor Cottenham having laid down the rule of law in Scotland to be, "that the Domicil "of Origin must prevail, unless it be proved that the party "has acquired another by residence, coupled with an in- "tention of making that his sole residence, and abandon- "ing his Domicil of Origin," proceeded to consider the evidence with reference to this rule. After observing that the case of *Lady Dalhousie* v. *M'Douall* (which had been argued, and as involving the same points of law as *Munro* v. *Munro*, stood over for judgment with that case) presented no difficulty, as in that case the Scotch domicil had clearly not been abandoned, he proceeded—"In the case of "*Munro* v. *Munro* the difficulty is apparently greater, "because there was a residence in England of many years; "but the only period to be considered is from the father "quitting Scotland, in 1794, to the time of the marriage "in 1801. There was a sufficient reason, independently

"of any intention of changing his domicil, for his leaving "Scotland in 1794. His family house was not in a fit "state for residence, and he had failed in effecting a pro- "posed arrangement with his mother, by which he wished "to obtain for his own use the house where she lived. "There is no ground for supposing that he at that time "intended to abandon Scotland; the reverse is proved by "the first letter he wrote after his arrival in London "(3rd of September, 1794), in which he gives directions "about keeping some land in grass, the only farming he "takes pleasure in, and about clothes-presses for his "dressing-room at Fowlis. In November 1794 he occu- "pied the office of Deputy-Lieutenant of Ross-shire. In "1795, on the 9th of February, he gave directions for the "preparation of a will in the Scotch form; and in a letter "of the 14th of June, he states his intention of being in "Ross-shire at the end of the month, which, by subse- "quent letters, it appears, was prevented by an attack of "illness. He, in a letter of the 1st of September, 1795, "expresses his regret at having been prevented going to "Scotland; and in a letter of the 14th of September he "says, he shall be there next summer; and in a letter of "the 18th he says, that he shall, after Whitsuntide next, "take the management of his estate into his own hands. "Similar expressions occur in many letters of 1795 and "1796. In a letter of the 7th of October, 1796, he says, "'I shall be in Ross-shire next year, and, should unfore- "'seen events oblige me to defer my journey,' &c.; and "in a letter of the 27th of October, he directs the pay- "ment in kind of hens and eggs to be continued, saying, "'when at home I shall have occasion for them.' Many "letters in 1797 speak of his intended journey to Scotland, "and in one of the 25th of November, 1797, he says, "'My journey to Ross-shire, so long and often retarded "'by circumstances which I could not foresee, is now, "'by the advice of my friends here, given up till next "'summer.'

"It appears that before this time, that is, in 1794 or "1795, the connection between the Appellant's father and "mother had been formed, and she was born in September "[*sic.* ? May] 1796, which may well account for the con- "tinued postponements of his intended journey to Scot- "land: but he does not appear ever to have abandoned the "intention; for in a letter of March 28th, 1798, to a per- "son in Scotland, he says that he expects very soon to be "able to write him the time at which he proposed to him- "self the pleasure of seeing him. In 1799, 1800, and 1801, "he gives directions for the fitting-up of his family resi- "dence in Scotland, and for that purpose sends large quan- "tities of furniture from London; and in September 1801 "he marries the Appellant's mother, and by letter of the "same year speaks of his intention of coming to Scotland. "In a letter of the 15th of April, 1802, he says, 'I have re- "'solved to be at Fowlis as soon as the house, which is "'painting and papering, can be inhabited; but as these "'things do not depend upon my wishes, I cannot fix "'positively any time. I hope to be in Edinburgh in "'July or August.' He accordingly went to Scotland "that year with his family, and resided in his family "house at Fowlis, and there continued till 1808, the "Appellant's mother having died there in 1803. Lord "Corehouse, who entered much into this part of the case, "in commenting on this correspondence, asked this ques- "tion, 'Do these expressions, when read in connection "'with the context, import that he was to return to Scot- "'land with a view to settle permanently there, and to "'live at the castle at Fowlis during the rest of his life? "'The very reverse is manifest.' And then he observes "upon expressions used indicating that the promised visit "to Scotland would be short. These observations would be "highly important if the question was whether, by his "subsequent residence in Scotland, he had acquired a new "domicil there, but they do not appear to me to touch the "question, whether he had abandoned the Domicil of

"Origin in that country, which can only be effected by "evidence of an intention to do so accompanying the act "of a residence elsewhere. If he ever formed such an "intention, to what period is the adoption of that reso- "lution to be referred? In order to be of any effect upon "the present question, it would be at some time prior to "September 1801, the date of the marriage.

"That he took a lease of the house in Gloucester "Place, and formed an establishment there, has been "much relied upon, and, in the absence of better evi- "dence of intention as to his future domicil, might be "important as affording evidence of such intention, but "cannot be of any avail when, from the correspondence, "the best means are afforded of ascertaining what his "real intentions were. The having a house and an esta- "blishment in London is perfectly consistent with a domi- "cil in Scotland. This fact existed in *Somerville* v. *Lord* "*Somerville*, and in *Warrender* v. *Warrender*. Taking, "therefore, the rule of law as to the Domicil of Origin to "be what I have before stated, and applying the evidence "to that rule, I do not find it proved that the Appellant's "father acquired a new domicil in England with the in- "tention of making that his sole residence, and abandon- "ing his Domicil of Origin in Scotland." (*u*)

II. AS TO ORAL AND WRITTEN DECLARATIONS.

CCXXIX. To these evidences of the intention—the indispensable element of true Domicil—the civilians (*w*)

(*u*) [See *The Lauderdale Peerage*, *L. R.* 10 *App. Ca.* p. 692; and *Chicago & N. W. Railway Co.* v. *Ohle*, 10 *Davis U.S.A. Supreme Ct. Rep.* p. 123.]

(*w*) "Declaratur autem animus ille vel expressè vel tacitè. Expressè si quis verbis vel literis profiteatur se in civitatem aliquam vel regionem eâ intentione habitatum venisse, ut ibi perpetuò esset. Atque de tali declaratione si constat, frustrà de voluntate domicilium constituendi dubitatur, sed quamprimùm actualis habitatio accedit, statim eo ipso momento domicilium censetur constitutum. *Carp.* lib. ii. *Respons.* 21, n. 15, etsi summam rerum nondum eò transtulerit. *Mæv. ad.* i. L. lib. i. tit. ii. n. 28, è contrario, si quis animum suum declara-

have always attached great importance. The French Code enacts that the proof of intention shall follow upon an express declaration, made either to the municipality from which a person removes, or to that to which he transfers his Domicil; and that, in the absence of such proof from express declaration, recourse shall be had to the consideration of the circumstances of the case (*x*).

CCXXX. From the case of *Munro* v. *Munro*, which has just been cited, it has been seen what great weight in the balance of evidence has been given by the highest legal authority in Great Britain to statements of intention made in *letters* written by the party whose Domicil is in dispute. It would be useless therefore to multiply inferior authorities upon this point.

CCXXXI. The English Courts appear generally to ascribe but little value to *oral* declarations.

CCXXXII. In the case of *Somerville* v. *Lord Somerville* the declarations seem to have rather inclined the balance towards the English Domicil. To some of his friends (according to the report in the case) he declared repeatedly that he considered his residence in London only as a lodging-house and temporary residence during the sitting of Parliament; but he spoke of Scotland as his residence and home, where he was born, and with the

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verit se nolle ibidem domicilium constituere, et perpetuò manere, non contrahit domicilium, licet per multos annos ibidem subsisteret et etiam majorem partem eò attulisset. (See, below, this doctrine denied by Lord Stowell in a prize case.) Nam in his quæ ab alicujus animo dependent, simplici illius dicto credendum et potius ad expressam declarationem quam factum respiciendum est, communiter tradunt Doctores *Amoya d.* 101, *Mascard. de Prob.* vol. i. *concl.* 434, n. 3, *non obstant.* l. ii. *C. ubi Senator vel Clariss.* ea enim loquitur de casu dubio, nos verò de certo."—*Tractatio de Domicilio Eberhardina*, s. 29.

(*x*) " Art. 103. Le changement de domicile s'opérera par le fait d'une habitation réelle dans un autre lieu, joint à l'intention d'y fixer son principal établissement. 104. La preuve de l'intention résultera d'une déclaration expresse, faite tant à la municipalité du lieu qu'on quittera, qu'à celle du lieu où on aura transféré son domicile. 105. A défaut de déclaration expresse, la preuve de l'intention dépendra des circonstances."—*Code Civil*, liv. i. t. iii. Du Domicile.

warmth of a native. About a month before his death Colonel Reading urged him to make a will, for the sake of his natural children; upon which he said he meant to take care of them, and also of his brother's younger children. Soon after this conversation, he told Colonel Reading that he had seen his nephew, Sir James Bland Burgess, who had alarmed him by telling him that, if he had died without a will, his personal estate would be divided among the several branches of his family, which he would much deplore; and afterwards, he said that he should soon go to Scotland, and would then make his will. He died in about a month after this conversation. Elizabeth Dewar, who had been housekeeper at Somerville House, in her depositions stated that she had heard the intestate say he was an Englishman; that though in Scotland, he was educated in England; his connections were English; he had no friends in Scotland, and everything he did was after the English fashion. The deponent had heard him say that his reason for going to Scotland was that he might be at his estate; that he did not like it, but he had promised his father, when dying, that he would live one half of the year in Scotland, and the other half in England; that he considered himself an Englishman; that his estate in England was preferable to that in Scotland; that he preferred England, and would never visit Scotland, except on account of the promise to his father; and that he did not care though Somerville House was burnt: and this he frequently said in conversation with the witness. In spite of these declarations, the Scotch Domicil was sustained by the judgment.

CCXXXIII. It is clear law that the expressions of an intention not to renounce a domicil cannot prevail against the intention and facts collected from the acts of the person, if those are otherwise sufficient to constitute a domicil abroad (*y*).

(*y*) *Re Steer*, 28 *Law Journal, Exch.* p. 22. [*Brunel* v. *Brunel*, *L. R.* 12 *Eq.* p. 298; *Doucet* v. *Geoghegan*, *L. R.* 9 *Ch. D.* p. 441.]

III. THE PLACE OF DEATH.

CCXXXIV. In England and America the place of death seems to have been considered a circumstance of very slight moment; it is admitted, however, to afford a *primâ facie* presumption (*z*), though of a faint kind: for it has been well said, "The question of Domicil, *primâ* "*facie*, is much more a question of fact than of law. "The actual place where he is, is *primâ facie* to a great "many given purposes his Domicil. You encounter that, "if you show it is either constrained, or from the neces- "sity of his affairs, or transitory; that he is a sojourner; "and you take from it all character of permanency" (*a*).

CCXXXV. In the leading American case, *Guier* v. *O'Daniel* (*b*), President Rush said, "A man is *primâ facie* "domiciled at the place where he is resident at the time "of his *death*: and it is incumbent on those who deny it "to repel the presumption of law, which may be done in "several ways. It may be shown that the intestate was "there as a traveller, or on some particular business, or "on a visit, or for the sake of health; any of which cir- "cumstances will remove the impression that he was "domiciled at the place of his death." And in *Ommaney* v. *Bingham* (*c*), the House of Lords considered the circumstance of Sir C. Douglas' death having taken place in Scotland (whither he had gone only for a temporary and limited purpose) as nothing. In *Munroe* v. *Douglas* (*d*), it was urged that the testator, knowing he was in a dying state, went to Scotland in order to lay his bones with his ancestors: the Vice-Chancellor took notice of the argument, but said the fact was disproved.

(*z*) "Taking the place of the deceased's death to be *primâ facie* the place of his domicil."—*Burton* v. *Fisher* (*Prerogative Court of Dublin*), *Milward*, p. 187.

(*a*) *Bempde* v. *Johnson*, 3 *Vesey's Rep.* p. 201.

(*b*) 1 *Binney's* (*Pennsylv.*) *Rep.* p. 349, note.

(*c*) Cited in 5 *Vesey's Rep.* p. 757.

(*d*) 5 *Maddock's Rep.* p. 291.

CCXXXVI. In *Somerville* v. *Lord Somerville*, the Master of the Rolls observed, "It was contended, in "favour of the English Domicil, that in such a case as "that of two domicils and to neither any preference, (for "it cannot be contended that the Domicil in Scotland "was not at least equal to that in England, except the "*lex loci rei sitæ* is to have effect), the death should decide. "There is not a single dictum from which it can be sup-"posed that the place of the *death* in such a case as "that shall make any difference. Many cases are cited in "*Denisart* to show that the *death* can have no effect, "and not one that that circumstance decides between "two domicils. The question in these cases was, which "of the two domicils was to regulate the succession, "and without any regard to the place where he died" (*e*).

CCXXXVII. In *Johnson* v. *Beattie*, Lord Campbell said (*f*), "It must be remembered that all her (the "mother's) own property, as well as the child's, was "situate in Scotland; that she went to reside there on "her husband's death; that she came to England only "on account of her health and her child's; that all "the tutors appointed by her husband resided in Scot-"land; and that there can be no doubt her daughter "would return to occupy the mansion of her ancestors. "I see no reason to think that, in case she should "recover her health, and her daughter should be brought "back to Scotland, she had permanently adopted England "as her place of residence, although her father resided "at Chester. She undoubtedly expected *to die* in Eng-"land, and she gave directions that her body should "be buried in England; but this was in her last sick-"ness, of the fatal termination of which she had a "foreboding. The question is, whether she had taken

(*e*) 5 *Vesey's Rep.* p. 783.

(*f*) 10 *Clark & Finnelly's Rep.* p. 138. See *Stuart* v. *Marquis of Bute*, *Stuart* v. *Moore*, 9 *H. L. Cases*, p. 440, for some comments on *Johnson* v. *Beattie*.

" up her permanent residence in England, in case she " should recover her health and strength. If, instead " of Albion Street, Hyde Park, she had gone for her " health to the Island of Madeira, where her husband " died, and had written letters stating that she should " *die* there, and had given directions that she should " be buried there, although she had *died and been buried* " there, unquestionably her Scotch Domicil would never " have been superseded." And so, in a recent case, Sir H. Jenner Fust remarked, " If he had died in Scotland, " that would not in the slightest degree have changed " my opinion that he was domiciled in India " (*g*). In the case of *Cornelius Van Leeuwen* (*h*), referred to above, the place of death was holden to be of no avail to the consideration of his Domicil, though his directions to be buried at a particular place, being the place of his Origin, seem to have had some weight ascribed to them.

CCXXXVIII. In the case of the *Marquis de Gassion*, referred to under the next heading (*hh*), the place of death, and that of making the will, were holden slight presumptions.

CCXXXIX. The presumption would, however, be stronger, where the place of death was also the place of Origin. It was the circumstance most strenuously insisted upon by Cochin, in the case of the *Marquis de Saint-Pater*, who had spent much of his time at Paris, as well as in the province of Maine, where he was born, and where he possessed a large, if not the largest, amount of his property (*i*).

(*g*) *Craigie* v. *Lewin*, 3 *Curteis' Eccl. Rep.* p. 449.

(*h*) § ccxxv. (*hh*) § ccxliv.

(*i*) " Secondement, le Marquis de Saint-Pater est mort dans cette même province du Maine, après y avoir passé les derniers tems de sa vie. Si dans l'intervalle il y avoit des preuves d'un domicile fixé à Paris, la circonstance de l'habitation dans les derniers tems, et de la mort dans le domicile d'origine, suffiroit pour prouver un esprit de retour à ce domicile, et pour effacer les preuves contraires qui s'élèveroient dans les tems intermédiaires. La nature éclateroit dans ses dernières démarches ; et ses opérations sont si vives que la loi ne

IV. PLACE OF WIFE AND FAMILY.

CCXL. The Roman lawyers were very careful to distinguish a mere habitation (*habitatio*) (*j*) from a Domicil (*domicilium*). They held that the mere purchase of a house did not indicate any intention of acquiring a new domicil, much less the purchase of a shop, or of a place for the deposit of goods.

CCXLI. And their opinions have been adopted by all European jurists. But if a person places his wife and family and "household gods" (under which class heirlooms, pictures, and muniments might reasonably be included (*k*)) in a particular place, the presumption of the abandonment of a former domicil, and of the acquisition of a new one, is very strong (*l*).

CCXLII. In *Ommaney* v. *Bingham* (*m*), the circumstance that, wherever Sir Charles Douglas went on service (which he did in divers countries and under divers governments), he left his wife and family in England, and always returned to them there, was holden to be one of the criteria which marked his Domicil; though the principal circumstance was his dying in the English service.

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balanceroit pas un moment à en reconnoître toute l'autorité."—*Cochin*, tome i. p. 6. [See *Dutch Civil Code*, tit. iv. art. 80, *cited antè*, § ccxxv. note (*r*).]

(*j*) "Illud certum est, neque solo animo atque destinatione patrisfamilias, aut contestatione solâ, sine re et facto, domicilium constitui; neque solâ domûs comparatione in aliquâ regione; neque solâ habitatione sine proposito illic perpetuò morandi: cum Ulpianus à domicilio habitationem distinguat, dum asserit, legem Corneliam injuriarum de domo vi introitâ *ad omnem habitationem in quâ paterfamilias habitat, licet ibi domicilium non habeat*, pertinere," &c. See *J. Voet*, lib. v. t. i. s. 98, citing l. lex Cornelia, 5 § si tamen 5 ff. de injuriis, &c., and other passages of the Civil Laws.

(*k*) See argument in *Somerville* v. *Lord Somerville*.

(*l*) "Accedit" (says *Grotius*, in an opinion cited by *Henry*) "altera conjectura ex invectione familiæ et bonorum," &c.—*Odwin* v. *Forbes*, Appendix, p. 198. [See *Aitchison* v. *Dixon*, *L. R.* 10 *Eq.* p. 589.]

(*m*) Cited in 5 *Vesey's Rep.* 757. See also *The Ann*, 1 *Dodson's Admiralty Reports*, p. 224.

CCXLIII. In *Bempde* v. *Johnson* (the case of the *Marquis of Annandale*), Lord Loughborough ascribed considerable importance to the fact of marriage. "In the "latter part of his life" (he says) "his Domicil *de facto* "was unquestionably in England; during the latter part "of it, and from an epoch remarkable enough when con- "tracting a second marriage and forming a new family "at that period, all the circumstances of his family point "much more to England than to Scotland" (*n*).

CCXLIV. The Marquis de Gassion was born in Béarn, where he had his Domicil of Origin. He afterwards resided a long time in Paris, and he had also a residence at Pau, where he made his will. He died at Pau, and the question was, whether the *Original* Domicil in Béarn had been superseded by a *real Domicil* at Paris. It appeared that he had married there, that the marriages of his children took place there, and that he had described himself in a power of attorney as "de "présent à Pau, mais demeurant à Paris." The facts of his having made a will and died at Pau were not holden sufficient to mark an intention of re-establishing his domicil there; whilst the other circumstances were holden to have proved a domicil *animo et facto* at Paris (*o*).

CCXLV. "He is not a married man" (*p*) (said Lord Stowell, in the case of the *Phœnix*), "holding any con- "nection with that place by the residence of his wife and "family." It was holden, however, by the same high authority, that, in the case of a North Briton by birth, personally residing in America, having been admitted a citizen of the United States and engaged in American trade, the mere circumstance of leaving a wife and family in Scotland would not avail to retain his national character. Dr. Story says, "If a married man has his family

(*n*) *Bempde* v. *Johnson*, 3 *Vesey's Reports*, p. 201.

(*o*) *Burge's Commentaries on Colonial and Foreign Laws*, vol. i. p. 45. *Denisart*, Domicile, I. s. 5.

(*p*) 3 *C. Rob. Adm. Rep.* p. 139.

" fixed in one place, and he does his business in another, " the former is considered the place of domicil " (*q*).

CCXLVI. In the following American cases, the wife and family were much considered as criteria of Domicil.

Mellen, C. J., said (*r*), " If, according to legal princi- " ples, Isaac Stanton, the pauper, is to be considered as " having *resided, dwelt,* and *had his home* in Parsonfield, " on the 21st of March, 1821, then he gained a settlement " by virtue of the act (*s*) passed on that day relating to " the settlement and support of the poor. It appears that " from 1800 or 1801 to 1817, he lived with his wife and " children in Parsonfield, with the exception of a short " time, during which he resided in another town, about " the year 1812; that, in 1817, he separated from his wife " and family, and has never had any connection with them " since; though he has continued generally to reside in " Parsonfield, sometimes employed in his trade of a mason " there, and in adjoining towns, and sometimes idle (as " mentioned in the exceptions) (*t*). It appears also that, " with the exception of nearly a year, the wife and " children have lived and kept house in that town. From " these facts, what is the legal conclusion as to the domicil " of the pauper? It is clear that, during all the time " that he resided in Parsonfield, and *lived with his family,* " he dwelt, in the strictest sense of the words, and *had his* " *home* in that town. In this situation he was in 1817, " and since that time he has generally resided there. " There is no fact in the case tending to show that he has " ever contemplated a residence in any *other* town, or has " in any manner lost his right as a townsman on an

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(*q*) *Conflict of Laws*, p. 50. [See *Platt* v. *Attorney-General of New South Wales*, *L. R.* 3 *App. Ca.* p. 336.]

(*r*) *The Inhabitants of Parsonfield* v. *Perkins*. 2 *Greenleaf's Cases in the Supreme Judicial Court of the State of Maine*, p. 414 (1824).

(*s*) *Statutes of Maine*, 1821, c. cxxii. s. 22.

(*t*) Brought by bill of exceptions from the Court below, whose judgment was reversed.

" election of state, county, or town officers, so far as resi-
" dence could give or affect such right. Nor is there any
" fact by which it appears that he may not return to and
" live with his family whenever he may be inclined to do
" so; or, in a word, that he may not resume his rights as
" the head of his family and former home at his option.
" As he has not become domiciled in any *other* town, and
" for the other reasons suggested, we are of opinion that
" his Domicil in Parsonfield must be considered as con-
" tinuing and existing when the act was passed: of course
" he then gained a legal settlement in that town, and the
" defendant was not guilty of the violation of any law in
" bringing the pauper into the town of Parsonfield, and
" leaving him there, as alleged in the writ. We sustain
" the exception, and the verdict is set aside."

CCXLVII. In another American case (*u*), the circumstance of the person whose Domicil was disputed, being unmarried, had great weight with the Court. It was a case of assumpsit on a promissory note, and there was a plea to the jurisdiction that the defendant is not a citizen of Rhode Island, as set forth in the writ, and issue thereon.

At the trial it appeared in evidence that the defendant was a native citizen of Rhode Island; and that his mother, his father being dead, still resided in Providence, in that State, on the family estate. The defendant was a young unmarried man, and was in partnership in New York for some time. This commercial house in New York had failed; and, upon that failure, he returned and resided with his mother at Providence. At the time of the service of the writ he was engaged as a clerk in the store of his brother in the State of Connecticut. But he made frequent visits to his mother in Providence, and no act appeared to show any intention of a permanent domicil in Connecticut. Upon these facts the case was submitted to

(*u*) *Catlin* v. *Gladding*, 4 *Mason's Circuit Court Rep.* p. 308.

the Court by Searle for the plaintiff, and R. W. Greene for the defendant.

Story, J.—"The opinion of the Court is, that the "defendant is a citizen of Rhode Island, and that the "plea is not maintained. His birth was in that State; "the family estate is there, and his mother remains on it. "The defendant is unmarried. While he was resident at "New York on business, he may be deemed to have ac- "quired a citizenship there, as he probably intended a "permanent domicil. But when the house failed, he gave "up his residence in New York and returned to his "mother's family. Under such circumstances he must be "presumed to have regained the family domicil, and to "have returned to his native allegiance. The native "character and domicil easily revert, and fewer circum- "stances are necessary to establish it than a foreign "domicil. Upon his return from New York he re- "acquired his native citizenship. What evidence is there "that he has since changed it? It does not appear that "he had any intention of becoming a citizen of Connec- "ticut. For aught in the case his engagement may be "merely temporary until he can get other business, and "without any intention of changing his domicil. *The case* "*might have been different if he had had a family, and* "*removed with them* into Connecticut. Such an act would "afford *primâ facie* evidence of a change of permanent "domicil. The judgment must, therefore, be for the "plaintiff."

CCXLVIII. In the case of *Cornelius Van Leeuwen*, referred to above, the absence of any domestic establishment, and the mere boarding and lodging of the person in the place where his trade was carried on, were the chief circumstances relied upon to show that no domicil had been acquired in that place(*x*).

CCXLIX. In America, owing probably to the habit of

(*x*) Vide *suprà*, § ccxxv.

the country, little, if any, stress seems to have been laid upon the fact of a person being only a boarder or a lodger at a place. "On a question of domicil" (it was said by President Rush), "the mode of living is not material, "whether on rent at lodgings, or in the house of a friend. "The apparent or avowed intention of *constant* residence, "not the manner of it, constitutes the domicil" (*y*).

V. HOUSE OF TRADE.

CCL. In the foregoing cases, the circumstances of marriage and family were not encountered by presumptions arising from a second establishment, in which the person's business was carried on. But even in these cases, it is said by great authority that the locality of the wife and family would be the better criterion of the domicil.

CCLI. Dr. Story says (*z*), "If a married man has his "family fixed in one place, and he does his business "in another, the former is considered the place of his "domicil."

CCLII. He relies for this position upon the text of the Roman Law, as adopted and enforced by French Jurists; but not upon any decided cases in the Courts of England or America (*zz*).

CCLIII. It is, however, an opinion in some degree confirmed by Grotius, who, deciding the domicil of an intestate in the Netherlands, observed that the Law of Embden will not prevail; "for although his partnership "firm was there, yet he had no habitation there;" and in the case of *Van Leeuwen*, as has been shown, the house of trade was not holden to counterbalance the Domicil of Origin.

(*y*) *Guier* v. *O'Daniel*, 1 *Binney's* (*Pennsylv.*) *Rep.* p. 349, note. See too the case of the *United States* v. *The Penelope*. *Peters's Admiralty Decisions*, p. 450. In *Craigie* v. *Lewin*, furnished lodgings were treated as no criterion of domicil.—3 *Curteis's Eccl. Rep.* p. 447.

(*z*) *Conflict of Laws*, c. iii. s. 46.

[(*zz*) See now *Platt* v. *Atty.-Gen. of N. S. Wales*, *L. R.* 3 *App. Cap.* 336, where *wife and family* outweighed *place of business*.]

CCLIV. The following case is selected by Henry from the "*Appendix ad Hollandsche Consultatien*," as one in which the testator had clearly abandoned his Original Domicil: the principal evidence of his having done so was his carrying on his business elsewhere. "L. G., a North "Hollander by birth, having, for more than thirty years, "fixed his residence at Dantzick, without change, and car- "ried on his business there, made his will, conformably "to the solemnities required by the law of that place; "whereby, after leaving some legacies, he left the rest of "his property to his heirs *ab intestato*, without declaring "who they were. His property consisted in merchandise, "outstanding debts, rights of action, and immoveable pro- "perty, both at Dantzick and North Holland; and the "question was, whether the law of the *domicilium habita- "tionis* or of the *domicilium originis* should prevail as to "the succession."

CCLV. The opinion of counsel was as follows:—"As it "appears that L. G. for upwards of thirty years has dwelt "at Dantzick until his death, without any indication of a "wish to return to his birthplace, it is, therefore, manifest "that he must be understood to have renounced this, and "to have fixed his domicil at Dantzick, *per textus express. in "l. ejus* 27, § 1, *ff. ad Municip. l.* 7, *cod. de Incolis*: 'nam ibi "'quis domicilium habere intelligitur ubi larem et for- "'tunarum summam constituit, unde (rursus) non sit dis- "'cessurus si nihil avocet.' Whence it follows that the "said L. G. having thought proper to appoint as his "heirs, his heirs *ab intestato*, must be understood to have "meant those who, according to the law of his *domicilium "habitationis*, would succeed" (*a*).

CCLVI. "No position" (says Lord Stowell) "is more "established than this, that if a person goes into another "country and engages in trade and resides there, he is, by

(*a*) *Odwin* v. *Forbes*, Appendix, pp. 208-9.

"the law of nations, to be considered as a merchant of "that country;" that is to say, as domiciled there (*b*).

CCLVII. Many passages in the luminous commentary on International Law contained in the reports from which this case is cited, show the anxious care with which that great Judge invariably guarded this position: thus, recent establishment was holden to constitute a domicil where intention of making a permanent residence was proved upon the party (*c*).

CCLVIII. No fugitive visits to the native country were allowed to counteract the presumption of domicil arising from a regular course of employment in a foreign country and trade (*d*).

CCLIX. The Consul who traded in the country where he resided was not permitted to cover his mercantile with his official character (*e*). A neutral subject found residing in a foreign country was presumed to be there *animo manendi*, and if a state of war brought his national character into question, it lay upon him to explain the circumstance of his residence (*f*).

CCLX. The owner of a landed estate, who confined himself to the shipment of its produce, was said not to stand exactly on the same footing as a general merchant retaining a Mercantile Domicil by his house of trade (*g*).

CCLXI. The cases referred to which contain the enunciation of this doctrine were indeed cases occurring in time of war, and at a time when it was often a matter of great difficulty to discover the trader in the enemy's commerce, who sought to disguise himself under the garb of a neu-

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(*b*) *The Indian Chief*, 3 *C. Rob. Adm. Rep.* p. 18. *The Matchless*, 1 *Haggard's Adm. Rep.* p. 103. *The Rendsburg*, 4 *C. Rob. Adm. Rep.* p. 139. *The President*, 5 *ib.* p. 279.

(*c*) *The Diana*, 5 *ib.* p. 60.

(*d*) *The Vriendschap*, 4 *C. Rob. Adm. Rep.* p. 166.

(*e*) *The Indian Chief*, 3 *ib.* p. 27.

(*f*) *The Bernon*, 1 *ib.* p. 102.

(*g*) *The Drie Gebroeders*, 4 *ib.* p. 235.

tral, or to retain his native character. They were cases of Commercial Domicil; and, in the first place, it must be recollected that, with respect to cases of this description, it has been holden that there may be transactions so radically national as to impress the national character, independently of the *local residence* of the parties (*h*). The doctrine contained in these and other cases decided by Lord Stowell, was formally and judicially recognised by the Supreme Court of the United States, in the great case of the *Venus*, Rae master (*i*). But, as has been already observed, further evidence of the *animus manendi* will generally be required to fix a Testamentary Domicil in time of peace.

VI. DEPOSITORY OF PAPERS AND MUNIMENTS.

CCLXII. It may be that a man may have two places of residence, in different countries, and spend his time, with his family, equally, or nearly so, at both.

CCLXIII. In this case, one criterion of domicil will be the having deposited at one of the two places his most valuable papers and muniments, and also, according to the civilians (*l*), the most valuable part of his goods; though money in the funds would be an exception to this rule,

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(*h*) *The Vigilantia*, 1 *ib.* pp. 12–15. *The Boedes Lust*, 5 *ib.* p. 233. *The Phœnix*, *ib.* p. 20.

(*i*) 8 *Cranch's Rep.* p. 279; and see *Wheaton's International Law*, §§ 328-332.

(*l*) "Sed si de animo expresso non constet, et aliquis in diversis locis bona habeat, ibi præsumitur habere domicilium, ubi maxima patrimonii quantitas sita, nam in dubio ibi videtur habere animum potissimum commorandi."—*Barbosæ et Taboris loci communes Jurisprudentiæ*, lib. iv. c. li. De Domicilio.

"Quando vero versabimur in dubio, ut si incola nunquam declaraverit, velit necne in loco domicilium contrahere, ibi tamen *bonam partem bonorum suorum* transtulerit, dicendum erit ex eo solo præsumi domicilium contractum." Opinion of *Bartolus*, adopted by *Mascardus*, who adds, however, "Illud vero, quod modo diximus, præsumi domicilium contractum, quod quis alibi *majorem partem bonorum suorum*

little, if any, inference of domicil being deducible from their locality.

CCLXIV. From the accidental place of debts, bills of exchange, &c., no presumption arises. In *Bruce* v. *Bruce* (*m*), Lord Chancellor Thurlow, overruling on this point the Court of Session, observed: "That he professed "not to see how the property could be considered in Eng- "land. It consisted of debts owing to the deceased, or "money in bills of exchange drawn on the India Company. "Debts have no *situs*; they follow the person of the "creditor."

And in the case of *Somerville* v. *Lord Somerville*, already referred to, the Lord Chancellor said: "It is hardly pos- "sible to contend that money in the funds, however large, "shall preponderate against his residence in the country "and his family seat."

VII. THE MANSION-HOUSE.

CCLXV. Another principal criterion, in cases of double residence, has been the existence of a mansion-house. It has been shown that a mere habitation, or dwelling-house, constitutes a presumption of domicil of the slightest kind. In *Somerville* v. *Lord Somerville* (in which there was a conflict between two acknowledged domicils), the Master of the Rolls observed: "That from a particular period Lord "Somerville had determined not to abandon his *mansion-* "*house*: so far from it, he made overtures with a view to "get apartments in Holyrood House: from which I con- "jecture, that, if that application had been granted, he "might have been induced to spend more time than he did

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transtulerit, ita intelliges, ut ex illâ translatione solâ non probetur domicilium, quod erat alibi, esse extinctum, cum quis possit habere domicilium pluribus in locis."—*Mascardus de Probationibus*, Concl. DXXXV. ss. 20–24 (vol. i. p. 522).

To the same effect, *Farinacius*, *Consiliorum* lib. i. consil. 85, nu. 168.

(*m*) See note to *Marsh* v. *Hutchinson*, 2 *Bosanquet & Puller's Rep.* p. 229.

" in Scotland. He came to London. I will not inquire " how soon he took a permanent residence there; *but I* " *admit from that time he manifested an intention to reside* " *a considerable part of the year in London, but also to keep* " *his establishment in Scotland, and to spend, as nearly as* " *possible, half of the year in each.* He took a lease of the " house evidently with the intention to have a house in " London as long as he lived, with a manifest intention to " divide his time between them." Then, after repudiating the notion that the circumstance of the death should decide the question, and alluding to the cases collected by Denisart, he proceeds: " The fair inference from these is, " that a person, not under an obligation of duty to live in " the capital in a permanent manner, as a nobleman or " gentleman having a mansion-house, his residence in the " country, and visiting the metropolis for any particular " purpose, shall be considered domiciled in the country. " On the other hand, a merchant, whose business lies in " the metropolis, shall be considered as having his domicil " there, and not at his (*n*) country residence. *It is not* " *necessary to enter into this distinction, though I should be* " *inclined to concur in it.* I therefore forbear entering " into the cases of *Mademoiselle Clermont de St. Aignan* (*o*) " and the *Comte de Choiseul*, and the distinction as to the " acts of the former describing herself as of the place of " the country;" and he adds, " it is of no consequence " whether more or less money was spent at the one place " or the other, living alternately in both."

CCLXVI. As a proof that the domicil of the Marquis de Saint-Pater was in Maine, and not at Paris, Cochin

(*n*) Compare the language of *Farinacius*: " Quod eo magis procedit, quia hæc mobilia non erant in loco Subiaci perpetuo permansura, sed ad tempus tantum : cum Paulus illuc accesserit recreationis causâ, ad effugiendos calores æstivos, &c. Et quia non censentur esse ejus loci in quo sunt illa quæ ad tempus tantum sunt in eo loco, ad alium locum revocanda, sed dicuntur esse illius loci ad quem revocanda sunt. '— *Consiliorum* lib. i. consil. 71, nu. 2.

(*o*) *Vide suprà*, § ccxxiv.

urges that at the latter place were "his household, his "domestic servants, his furniture, all that he had need of "for daily use—all, in one word, which the Law calls "'*instrumentum domesticum*;' whereas at Paris he had "lived either in a friend's house, or in an 'hôtel garni'" (*p*).

CCLXVII. In the case of *Balfour* v. *Scott*, which is cited in the report of the foregoing case, it was proved that Mr. Scott, whose domicil was disputed, had intended completely to abandon his domicil in Scotland. Twelve years before his death, he had dismantled his mansion-house and broken up his establishment, leaving only a gardener there. He paid two or three visits to Scotland, but on such occasions resided with his friends; and during the latter period of his life, even these visits were discontinued. He had invested all his money in the funds. It was holden by the House of Lords that the Domicil of Origin in Scotland had been abandoned.

CCLXVIII. In the case of the Dowager Queen *Henrietta Maria*, her palace of Somerset House was urged as a far stronger criterion of domicil than the house she possessed at Paris (*q*).

CCLXIX. In the case of *Ommaney* v. *Bingham*, before referred to, there was no mansion-house, or even estate, to corroborate the Domicil of Origin, circumstances which were much insisted upon by counsel in distinguishing it from the case of *Somerville* v. *Lord Somerville*.

CCLXX. In *Lord Annandale's* case, there was also no mansion-house; there was evidence only that he had stamped with his foot upon the ground of his Scotch

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(*p*) *Cochin*, tome i. p. 6: "En un mot, ce que la loi appelle '*instrumentum domesticum*;'" and p. 8: "On a trouvé des meubles dans l'appartement de Paris : mais on en a trouvé une plus grande quantité à Loresse, et *des meubles qui indiquent le véritable domicile* : savoir, toute la batterie de cuisine, le linge ordinaire, tant de table que des chambres, et généralement tout ce qui compose, si on peut parler ainsi, tout l'attirail d'une maison."

(*q*) *Life of Sir L. Jenkins*, vol. ii. p. 669.

estate, and said, "Here I built my house!" (*qq*). The absence of the mansion-house was a material fact in the case; for Lord Annandale, like Lord Somerville, was one of the sixteen Scotch peers.

CCLXXI. So, too, it has been said that in the subsequent case of *De Bonneval* v. *De Bonneval* (*r*), the establishment and ancestral château of the deceased in France were very important ingredients in the decision that the domicil was French, and a long lease of a house in London which was kept by two female servants, was not holden to be any counterpoise to the inference of domicil deducible from the family mansion. Though the learned Judge said, "his taking the lease of a house for eight years " would be a strong fact to show intention if it had been " followed up by a continued residence there."

CCLXXII. On the other hand, much stress was laid upon the fact that his correspondence, extending over a long period of time, and the family plate and papers were kept at his château in France. In the case of *Warrender* v. *Warrender*, the deceased's having "his capital man- " sion" in Scotland was considered among the principal circumstances which fixed his domicil in Scotland (*s*). Letters addressed to a person at a particular place are very slight, if any, evidence of domicil, though the answers to them may be (*t*).

CCLXXIII. In the case of the *Marquis de Saint-Pater*, a sort of Journal written in his own hand, and entitled " Mémoire de mes voyages et séjours à Paris," was strongly urged as a proof that Paris was *not*, and that Loresse was, his domicil. It was said to bring the latter place directly

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(*qq*) Referred to in 5 *Vesey's Rep.* p. 765.

(*r*) 1 *Curteis's Eccl. Rep.* p. 856, A.D. 1838.

(*s*) 2 *Clark & Finnelly's Rep.* p. 520.

(*t*) " On ne peut prouver le séjour d'une personne dans un lieu uniquement parce qu'on lui a adressé des lettres dans le même endroit; ce ne seroit que par ses réponses qu'on pourroit le justifier."—*Cochin*, tome ii. p. 411.

under the definition of the Roman Law, (*u*) and so was the fact that all his title deeds and valuable papers were kept at Loresse (*w*).

CCLXXIV. In the very important case of *Munro* v. *Munro* (*x*), before referred to, Lord Chancellor Cottenham, commenting upon the various evidences of intention evinced by the conduct of Sir Hugh Munro, observed, "That he took a lease of the house in Gloucester Place, "and formed an establishment there, has been much "relied upon, and, in the absence of better evidence of "intention as to his future domicil, might be important "as affording evidence of such intention, but cannot be "of any avail when, from the correspondence, the best "means are afforded of ascertaining what his real in-"tentions were. The having a house and an establish-"ment in London is perfectly consistent with a domicil "in Scotland. This fact existed in *Somerville* v. *Lord* "*Somerville*, and in *Warrender* v. *Warrender*."

CCLXXV. In this case of *Munro* v. *Munro* it was proved that the family mansion was undergoing repair, and that furniture had been purchased for it. It was urged in the argument in *Somerville* v. *Lord Somerville*, that family pictures might, in some degree, denote the family mansion, and be considered as answering to the *lares* of the Romans.

VIII. DESCRIPTION IN LEGAL DOCUMENTS.

CCLXXVI. Lord Somerville was described in the books of the Bank of England as of Henrietta Street, Cavendish Square, but it was successfully contended in argument that this was merely the designation of the broker, and could furnish no inference.

CCLXXVII. In *Curling* v. *Thornton*, the circumstance

(*u*) "Unde cum profectus est, peregrinari videtur; quodsi rediit, peregrinari jam destitit."—*Code*, lib. x. t. xxxix. 7.

(*w*) *Cochin*, tome i. pp. 7, 9.

(*x*) 7 *Clark & Finnelly's Rep.* p. 881.

of Colonel Thornton's having applied for and obtained a royal ordinance assuring to him certain privileges so long as he resided in France, and a territorial title, was not holden by Sir John Nicholl to weigh in the scale against the circumstances of his Domicil of Origin, and of his houses containing family papers and valuable moveables, which were in England (*y*).

CCLXXVIII. But it is to be remembered that the opinion of this learned Judge, that a British subject could not select a Foreign, in complete derogation of his British domicil, pervades this case, and that such opinion has been subsequently pronounced erroneous.

CCLXXIX. In *De Bonneval* v. *De Bonneval* the Court observed: "I am not inclined to pay much attention to the "descriptions of the deceased, in the legal proceedings in "France, for it may have been necessary, as the proceed-"ings related to real property, that he should describe "himself as of some place in that kingdom."

CCLXXX. In the *Marquis de Gassion's* case, already referred to, his description in a power of attorney as "de "présent à Pau, mais demeurant à Paris," seems to have influenced the decision that his domicil was at the latter place.

CCLXXXI. The weight due to this species of evidence must very much depend upon the particular circumstances of each case; but it would rarely be safe to discard altogether the consideration of it.

CCLXXXII. It should be observed that French lawyers appear to have always laid considerable stress upon it. Thus, in the case of the *Marquis de Saint-Pater*—as a preface to which Cochin has prefixed the title, "Where "ought the domicil of a deceased to be fixed who has "varied in his declarations?"—and where the question was, whether the Marquis was domiciled at Paris, or in Maine, the notarial acts in which he is described as "de-

(*y*) 2 *Addams's Rep.* p. 6.

" meurant à Paris," or " demeurant à Loresse," &c., are carefully summed up; and it was urged that the greater number of these acts described him as " demeurant à " Loresse " (*z*).

IX. THE POSSESSION AND EXERCISE OF POLITICAL RIGHTS AND PAYMENT OF TAXES.

CCLXXXIII. These circumstances have been considered as strong tests of Domicil by the Roman law (*a*) and by the civilians, but have had perhaps less weight given to them in England than in continental Europe (*b*).

(*z*) " Il faut convenir que le nombre des actes qui le déclarent demeurant à Loresse est bien supérieur à ceux qui indiquent une demeure à Paris."—*Cochin*, tome i. p. 6.

(*a*) " Dictæ expressæ declarationi domicilii constituendi æquipollet illa, si quis in civitate aliquâ jus civitatis (*das Bürgerrecht*) impetraverit et ibi habitaverit, vulgo *da eine verbürgerte oder Erbschuldigung geleistet häuslich und beständig gesessen ist*. Requiritur autem copulativè ut quis ibidem, non solum jus illud impetraverit sed etiam actualiter habitet."—*Tractatio de Domicilio Eberhardina*, t. xxx. p. 27, and authorities there cited.

(*b*) " Si quis, &c. omnibus denique municipii commodis, nullis coloniarum fruitur: ibi magis habere domicilium quam ubi colendi causâ diversatur."—*Dig.* lib. l. t. i. 27, § 1. See this passage from the *Digest*, and *Menochius*: " Illud tamen observandum est, quod etsi quis nomine dicitur civis originarius ob id, quod in civitate natus sit, vel privilegio creatus civis, attamen ut commodis et privilegiis civitatis fruatur, habitare in ipsâ civitate, atque ita domicilium in eâ habere, et cum aliis civibus onera sustinere debet." And then quoting the authority of other civilians: " Et idem ego ipse respondi, *in cons.* 390 &c., dixi civem hunc non sustinentem onera esse impropriè civem et secundum quid; " and he adds the authority of other civilians, and the decisions in the " Rota Romana :" " Qui scripserunt civem originarium aliquem non esse, nisi parentes ibi domicilium contraxerint et civitatis munera subierint; ita et olim apud Romanos civis Romanus dicebatur is, qui etsi natus esset Romæ attamen domicilium Romæ in ipsâ urbe contraxisset, atque tribum et bonorum potestatem adeptus esset."—*De Præsumptionibus*, lib. vi. Præs. xxx. nu. 24, (p. 777).

Mascardus says unhesitatingly: " Præterea mutare et constituere domicilium in eâ urbe is præsumitur qui privilegium impetravit, quo jus civitatis petebat."—*De Probationibus*, Concl. DXXXV. 4, (vol. i. p. 521).

CCLXXXIV. In the case of *De Bonneval* v. *De Bonneval*, mentioned above, the Court observed: "I am inclined "also to pay very little attention to the statement as to "his exercise of political right in France, or to his being "registered as a voter here; being a housekeeper, he was "registered here as a matter of course. It is stated that "he resisted, with success, the contribution to some "French rates, which a person resident in France was "liable to; but the grounds are not stated, and it is too "loose a reasoning, that because all French subjects are "liable to such rates, and he successfully resisted them, "therefore he was not domiciled in France. It must be "shown that the question came regularly before the "French tribunals, and that he was held not to be a "domiciled subject of France" (*c*).

CCLXXXV. It may be doubted, however, whether, if the circumstance had been so proved, it would have very materially influenced the decision of the question. In the American case of *Guier* v. *O'Daniel* (*d*), the President Rush said: "It is, I think, extremely doubtful whether "voting and paying taxes are in any way necessary to "constitute a domicil, which, being a question of General "Law, cannot depend on the municipal regulations of "any state or nation. Voting (in America) is confined "to a few counties, and taxes may not always be de-"manded."

CCLXXXVII (*e*). The Law of Domicil is not to be confounded with the law of *Settlement* which may obtain in any country. In an American case, entitled "*The*

See also the opinion of the Dutch lawyers, cited by *Henry* in his Appendix, p. 193, from the *Hollandsche Consultatien*, vol. iii. consult. 138: "Ubi exemplum affert ejus qui cum esset civis Mediolanensis, per multos annos autem Genuæ vixisset, *et non subiisset aliqua onera* tanquam civis Genuensis, statuit eum ibi non fixisse domicilium."

(*c*) 1 *Curteis's Eccl. Rep.* p. 869. See case of *Curling* v. *Thornton*, 2 *Addams's Rep.* p. 6.

(*d*) 1 *Binney's* (*Pennsylv.*) *Rep.* p. 349.

(*e*) § cclxxxvi. of the first edition has been omitted.

"*Inhabitants of Cambridge* v. *The Inhabitants of Charles-*"*town,*" a citizen of Vermont having resided in a town in that state for ten years, and having paid taxes more than five years, was holden to have acquired a settlement in such town, although he left his wife and children upon a farm at Vermont, and occasionally visited them there, and once tarried with them five or six months during the term (*f*).

CCLXXXVIII. In the following case (decided, it must be remembered, in the Prize Court) (*g*), the citizenship conferred by the United States upon a British subject appears to have been a principal ingredient in deciding that his Domicil was American, and, in conjunction with his personal residence and the character of his ship, to have overpowered the presumption arising from the residence of his wife and family in Scotland, that his National Domicil had been retained. The peculiarity of the case, and the high authority of the Judge, seem to warrant its insertion at full length in this place.

The Ann.—This ship, under American colours, was seized in the river Thames, by the Marshal of the Admiralty, on the 1st of August, 1812. A claim was given by the master, who was also sole owner of the ship, describing himself to be a British subject, and, as such, entitled to the benefit of the Order in Council of November 1812, directing the restitution of British ships under the American flag. It appeared that he was a native of Scotland, and that his wife and family resided in that country, but that he had himself been admitted a citizen of America about sixteen years ago, upon taking an oath that he had been sailing out of an American port for two years; that from the year 1799 till 1805, he had been connected with a house of trade at Glasgow, which had an establishment at New York, and another at Charlestown, and that he

(*f*) 13 *Mass. Rep.* p. 501.
(*g*) 1 *Dodson's Adm. Rep.* p. 221.

had occasionally resided at each of the last-mentioned places; that he had purchased this vessel at public auction in America, and had made three voyages in her, the first two from Charlestown to Kingston in Jamaica, returning each time in ballast; and the last from Charlestown to the river Thames. The question was, whether, from the residence and employment of this man, he was, *quoad* this vessel, to be considered a British subject.

CCLXXXIX. Sir W. Scott gave judgment: "This "ship, when seized by the Marshal in the river Thames, "was under the American flag; but, according to the "account given by the master, was not furnished with "the American, or, indeed, with any pass whatever. It "is very difficult to conceive that this was the true state "of the case, since the ship was not only American built, "but likewise American owned, as far at least as the ostensible character of the claimant is concerned; for, though "he could not altogether throw off his allegiance to his "native country, he had been admitted a citizen of the "United States. I cannot conceive, therefore, why the "pass was not granted, or what obstacle prevented this "man from obtaining so important a document. I must "presume that the vessel was furnished with an American "pass; but, supposing the case to be otherwise, still, if "the ship was furnished with the documents usually "granted to American ships, the same rule of law must "be applied as if she had been furnished with a regular "flag and pass. The ship must be conclusively held to "be American property, and, consequently, subject to "condemnation.

"It is said, however, that this ship is protected by the "Order in Council issued on the 28th of November, 1812, "by which it is directed, that 'all vessels under the flag "'of the United States of America, which are *bonâ fide* "'and wholly the property of his Majesty's subjects, and "'not purchased by them subsequent to the date of hostilities on the part of the United States of America,

" ' and which shall have been detained in port under the
" ' embargo, or shall have sailed to or from the ports of
" ' this kingdom previous to the knowledge of hostilities,
" ' and shall have been captured on such voyage, shall be
" ' restored to the British owners, upon satisfactory proof
" ' being made to the High Court of Admiralty, or the
" ' Courts of Vice-Admiralty, to which they shall be taken
" ' for adjudication, that the said vessels are *bonâ fide* and
" ' wholly the property of his Majesty's subjects as afore-
" ' said, and had been engaged in trade as above described.'
" A claim has been given for this ship by Mr. Smith, de-
" scribing himself to be a British subject; and, if he is a
" British subject, he will, under this Order in Council, be
" entitled to restitution.

" The question, therefore, comes to this, whether the
" claimant is, *quoad* this property, to be considered as a
" British subject. For some purposes he is, undoubtedly,
" so to be considered. He is born in this country, and is
" subject to all the obligations imposed upon him by his
" nativity. He cannot shake off his allegiance to his
" native country, or divest himself altogether of his British
" character, by a voluntary transfer of himself to another
" country. For the mere purposes of trade, he may, indeed,
" transfer himself to another State, and may acquire a
" new national character. An English subject resident in
" a neutral State is at liberty to trade with the enemy of
" this country in all articles with the exception of those
" which are of a contraband nature; but a trade in such
" articles would be contrary to his allegiance. Now, the
" account which he gives of himself is, ' that he was born
" ' at Falkirk, in Scotland; that during the last seven
" ' years he has been chiefly at sea, but, when at home,
" ' he has lived, and still lives, at Bathgate, in the shire
" ' of Linlithgow, in North Britain; that he is a subject
" ' of our Sovereign Lord the King, but, about sixteen
" ' years ago, he was admitted a citizen of the United
" ' States of America for the purpose of commerce only.'

" Why, this transaction is for the purpose of commerce. " According to his own account, then, he ceased to be a " British subject for commercial purposes. He goes on " to say, ' that he was admitted for the purpose of cover- " ' ing a ship of his own, to enable her to sail without " ' risk of capture, and he was so admitted by the magis- " ' trates of Philadelphia, on oath being made that he had " ' sailed out of an American port for two years; that he " ' hath never been admitted a burgher or freeman of any " ' city or town, but from the year 1799 to the year 1805, " ' the deponent having been connected in a house of " ' trade at Glasgow, which had a house at New York, and " ' another at Charlestown, in South Carolina;' so that " from the year 1799 to the year 1805, he might, as far " as he was connected with the house in Glasgow, and for " that particular branch of his trade, be considered a " British subject. But, since that time, I understand him " to say that he has withdrawn altogether from that con- " nection. He says afterwards, in answer to the ninth " interrogatory, ' that he is a North Briton by birth; and, " ' when he is at home, his place of residence is Bath- " ' gate, in the shire of Linlithgow, in North Britain, " ' where his wife and family reside, and where he, the " ' deponent, hath always resided from the time he was " ' ten or eleven years of age, when he was not at sea or " ' in foreign parts.' The affirmative part of his history, " as far as it goes, shows that he lived very much abroad, " and principally at New York or Charlestown, in America. " True it is that he had no house in either of these places, " but he was there a single man. It is not the mere " circumstance of leaving a wife and family in Scotland " that will avail him for the purpose of retaining the " benefit of his national character. He cannot be per- " mitted to take the advantage of both characters at the " same time, and in the same adventure. The utmost " that can be allowed to him is that he should be entitled " to the one character or the other, according to the cir-

" cumstances of the transaction. When the vessel herself " is American-built, when the personal residence of the " owner, as far as he has any, is in America (for it does " not appear that this man at all resided in Scotland), it " would be difficult to say that it could be any other than " an American transaction. Since the purchase of this " ship by Mr. Smith, he has made three voyages, two of " them to Kingston, in Jamaica, and one to the port of " London; but to the ports of Scotland he has never " sailed, nor does it appear that he has even visited his " wife and family in that country. He has been sailing " constantly out of American ports, and his prevailing " destination has been to the West Indian Islands. It is " quite impossible that he can be protected under the " Order in Council, which applies only to those who are " clearly and habitually British subjects, having no inter- " mixture of foreign commercial character. It never could " be the intention of His Majesty's Government that the " benefit of this Order should be extended to a person " who has thrown off his allegiance, and estranged himself " from his British character as far as his own volition " and act could do. I am of opinion that Mr. Smith is " not entitled to the benefit of the Order in Council, and " therefore I reject the claim."

CCXC. The case of *Stanley* v. *Bernes* has been already referred to as being the first case in which it was decided that a British subject, domiciled in a foreign country, cannot make a valid will unless it be executed according to the forms prescribed by the law of that foreign country. In this place it is only necessary to state the facts of the case, upon which Sir John Nicholl said there was little if any controversy, and he states them thus:—" The testator " (Mr. Stanley), a native of Ireland, went, in 1770, to " Lisbon, and there engaged in business as a merchant: " soon afterwards, he married a lady, a Portuguese by " birth, though of Irish parents and a Roman Catholic. " In order to contract that marriage he professed the

"Roman Catholic religion. In 1798 he obtained letters "of naturalisation as a Portuguese subject, and, in 1808, "when the French were in possession of Portugal, it is "alleged that he was treated as a Portuguese subject; "that is denied, and it is, on the other side, alleged that "he was treated as a British subject. The manner, how-"ever, in which the French treated him is not very "material to the decision of this case. Before their "arrival he had placed a large part of his property in his "son's name, who was born in Portugal; but the will "recites 'that it was a fictitious measure as a security "'against the French.' The testator had four children "by his wife, but only the present party survived him. "His wife, having become insane, was removed from "Portugal to Ireland, where the connections of both "resided. She was there supported by an allowance paid "out of the property of the deceased, placed, as already "mentioned, in the possession of his son. The deceased, "in 1808, removed from Lisbon to Madeira, and continued "to reside in that island till his death in 1826." Such being the state of the facts, it was argued, on the one side, that fifty years' residence, confirmed by change of religion, marriage, and naturalization, had rendered him a Portuguese subject, and that Portuguese Law must govern his will. On the other side it was contended that residence without intention would not destroy the Domicil of Origin; that during his life and death he had been considered as a British subject; or that, if he were domiciled in Portugal, he still had the right of a British subject to dispose of his property by a will made in the English form.

CCXCI. Sir John Nicholl seems to have doubted whether Mr. Stanley was a domiciled Portuguese, but decided that he had a right to make his will according to British Law. This decision was reversed by the Delegates, who held Mr. Stanley to have been domiciled in

Portugal (*h*), and therefore obliged, as the law then stood, to make his will according to the law of that country (*i*).

CCXCII. Thomas Moore died at Alicant, in Spain. His father was a natural-born British subject; his mother was born in Spain, but was the daughter of a British subject, and died in London. The father, George Moore, was principal of an eminent mercantile house at Alicant; his son, Thomas, was born there in 1775: after passing his childhood in Spain, was educated at Toulouse and Liège, ultimately became the head of the house at Alicant, and continued to his death to be there domiciled: in 1817, he ceased to have any connection with mercantile business. [It was pleaded that] he had been in England from 1807 to the middle of 1812; from the beginning of 1813 to the latter end of 1815; again in 1818, and in 1821, when it was said that he intended to return, and had frequently so declared. He died at Alicant in 1830. The question was, whether his testamentary papers were subject to the Law of Spain or of England. In favour of the latter position, it was alleged that he was entitled, under existing treaties with Spain, to the privilege of a British subject; there were letters from the deceased, showing that he considered himself, and claimed to be considered, as a British subject.

CCXCIII. It was argued that the case fell under the principle of *Stanley* v. *Bernes*, and that the deceased must be considered as domiciled in Spain. The Court seemed at first to doubt whether there might not be a distinction between this case and that of Mr. Stanley, inasmuch as Mr. Stanley was naturalized in Portugal, and took all the advantages of a Portuguese subject; whereas, though the deceased had made a long residence in Spain, yet it was

(*h*) *Stanley* v. *Bernes*, 3 *Haggard's Ecclesiastical Reports*, p. 373.

(*i*) *Bremer* v. *Freeman*, 10 *Moore's P. C. Rep.* p. 361. This case, and the past and present law on this subject, are considered hereafter, § cccxlvi.

alleged that he resided under the faith of a special treaty, and always claimed to be considered as a British subject; and that cases of Domicil did not depend upon residence alone, but on a consideration of all the circumstances of each particular case.

CCXCIV. But, when the cause came to a final hearing, it seems that the counsel, the King's Advocate of the day, declined to argue the question raised by the treaty, (*j*) and Sir John Nicholl said, "The deceased may "have been a subject of both Great Britain and Spain; "but the question is, where was he domiciled at his "death? for though he might occasionally visit Eng- "land, and make a considerable stay there; though "under a special Act of Parliament (7 Anne, c. 5, ex- "plained by 4 Geo. II. c. 21), his father being a British "subject, he was entitled to certain privileges, and to be "considered for certain purposes as a British subject (and "when it was convenient to him, he certainly seems to "have claimed that character), yet by birth he was a "Spaniard, and by education, by trade and commerce, by "residence at his death, he was domiciled in Spain, &c., "and the *lex domicilii* must govern the case" (*jj*).

CCXCV. *The Duchess of Kingston*, whose case has been already referred to, resided in France, and, though not a naturalized subject, had obtained permission from the King of France, under letters patent, registered in the Parliament, to acquire, possess, and dispose of property. She made her will in a form valid in England, but invalid in France; and it was sustained upon the ground that she had retained her English Domicil (*k*).

(*j*) See per *Dr. Lushington* in *Maltass* v. *Maltass*, 1 *Robertson's Eccl. Rep.* p. 79.

(*jj*) *Moore* v. *Darell and Budd*, 4 *Haggard's Eccl. Rep.* p. 346.

(*k*) *Collectanea Juridica*, vol. i. pp. 323-331, contains the opinion of *Monsieur Target* referred to by *Sir John Nicholl*, *Curling* v. *Thornton*, 2 *Addams's Reports*, p. 22. *Supra*, § cxciii. *note* (*e*).

X. POSSESSION OF REAL ESTATE (*l*).

CCXCVI. Cochin, in his argument in the case of *The Marquis of Hautefort*, denies that a landed estate derived from inheritance is any proof of domicil (*m*).

CCXCVII. So in the case of the *Drie Gebroeders*, Lord Stowell said, that landed estate alone had never been holden sufficient to constitute domicil, or fix the national character of the possessor who is not personally resident upon it (*n*).

CCXCVIII. In the case of *Warrender* v. *Warrender*, Lady Warrender had been infeft in real estate in Scotland, in pursuance of her marriage contract; but it was admitted, the Scotch domicil could not be supported on that ground (*o*).

XI. LENGTH OF TIME.

CCXCIX. Among the most important criteria of Domicil must be reckoned the *length of time* during which the residence has continued in a particular place.

CCC. This question may be best considered under two divisions.

1. Where the presumption of the new domicil, arising from long residence, is not counteracted by any contrary presumption arising from the special object or purpose of the residence, or by any declaration or other indication of an intention to return to the Domicil of Origin.

2. Where it is so counteracted.

(*l*) "Aus dem so eben bestimmten Begriff des Wohnsitzes ergiebt sich die wesentliche Verschiedenheit desselben, vom blossen Aufenthalt so wie vom Grundbesitz."—*Savigny, R. R.* viii. s. 353.

(*m*) "Un homme est-il domicilié dans une terre parce qu'il l'a eue par la succession de son père?"—*Œuvres*, tome i. p. 400.

See also on this point various cases collected, in which the succession to real or heritable, and also to personal estate, was involved in the same decision.—*Robertson on Personal Succession*, c. viii. s. 2.

(*n*) 4 *C. Rob. Adm. Rep.* p. 235.

(*o*) 2 *Clark & Finnelly's Rep.* pp. 502-521.

CCCI. Many of the civilians (among them Accursius, Baldus, Bartolus) held that residence for ten years (*decennalis habitatio*) created a legal presumption of change of domicil, while some thought that it was in every case a matter for the discretion of the Judge (*judicis relinquendum arbitrio*), to be exercised with due regard to the place and condition of the person (*juxta loci et personarum conditionem*) (*p*). Some States of modern Europe have fixed, by positive statute, the time within which a domicil shall be acquired.

CCCII. In the following case (extracted from the *Hollandsche Consultatien*, vol. ii. p. 42), lapse of time was holden to have effected a tacit abandonment of a former domicil. L. G., a North Hollander by birth, having for more than thirty years fixed his residence at Dantzick, without change, and carried on his business there, made his will conformably to the solemnities required by the law of that place: whereby, after leaving some legacies, he left the rest of his property to his heirs *ab intestato*, without declaring who they were. His property consisted in merchandise, outstanding debts, rights of action, and immoveable property, both at Dantzick and North Holland; and the question was, whether the law of the *domicilium habitationis*, or *originis*, should prevail as to the succession. The opinion of the Dutch jurist was: "As it appears that L. G. for upwards of thirty years has "dwelt at Dantzick until his death, without any indication "of a wish to return to his birthplace, it is therefore "manifest that he must be understood to have renounced "this, and fixed his Domicil at Dantzick, relying upon "the text in the Digest, which has been already cited "(*nam ibi quis domicilium habere intelligitur ubi larem et "fortunarum summam*)" (*q*).

(*p*) *Mascardus de Probat.*, Concl. DXXXV. 9, 10, (vol. i. p. 521).

(*q*) "Civis etiam quis efficitur longâ atque diuturnâ habitatione, quâ domicilium constituitur," says *Menochius de Præsumptionibus*, lib. vi. Præs. xxx. 23, (p. 777).

CCCIII. In an American case, entitled *Elbers and Kraffts* v. *The United Insurance Company* (*r*), this question of time was much considered. Spencer, J., delivered the opinion of the Court: "The plaintiff claims for a total "loss on the ground that the vessel having sailed on the "voyage was never heard of afterwards; and, a year and "a day having elapsed, she is presumed to be lost. The "claim is resisted: 1st, because there is no proof that the "vessel ever sailed; 2nd, that there was a breach of the "warranty as to the Swedish ownership of the goods in- "sured, Kraffts having lost his Swedish and acquired an "American character by being domiciled here.

"This last point will be first considered.

"The plaintiffs had a mercantile establishment as "partners in St. Bartholomew's several years prior to "February 1814, and it is proved also that Kraffts came "to this country for the recovery of his health in 1811, "and has ever since continued to reside here, being occa- "sionally at New York, Philadelphia, and Baltimore, "having agents at those places who generally corresponded "with, and transacted the business of, the house of Elbers "and Kraffts, at St. Bartholomew's—Kraffts having him- "self, in one instance, in 1813, made a purchase of a pro- "duce for the house, which he shipped to it, when Kraffts "was present at New York; that his agent there advised "and consulted with him on the business of the house, "and constantly kept the house in St. Bartholomew's ad- "vised of the business transactions in this country; and "that Kraffts applied to T. Roger, one of his agents in "New York, saying he wanted an agent in Philadelphia, "and received letters to Bohlen and Co. upon that subject. "It does not appear that he had any counting-house.

"It is an established principle, not only in the Prize "Courts, but also in the Common Law Courts, that ship- "ments made by merchants actually *domiciled* in the

(*r*) 16 *Johnson's* (*New York*) *Rep.* p. 128 (Jan. 1819).

" enemy's country at the breaking out of the war, partake " of the nature of the enemy's trade, and, as such, are " subject to belligerent capture. The only question is, " whether Kraffts was temporarily here, or whether he " was here *animo manendi*. He having remained in the " United States for such a length of time, the presumption " of law is that it was his intention to reside here per- " manently; and he is bound to explain the circumstance " of his residence to repel that presumption. This is the " doctrine of the British Admiralty Court (*s*), and it is " founded in good sense and the plainest principles of " policy. The fact of a person residing in a country for a " considerable period leads to the conclusion that he has " adopted it as his residence. If the real fact be other- " wise, he alone can show it. Kraffts came to this country " for his health; but he has not shown that the state of " his health required his continuance here. We find him " on one occasion actually purchasing a cargo to be sent " to St. Bartholomew's, constituting a commercial agent, " and superintending the concerns of the house by advis- " ing with and consulting with the agent of the house in " relation to their business with the firm. Indeed, there " is no proof that Kraffts ever talked of returning to St. " Bartholomew's, or that he ever explained himself to any- " one, that he was here for mere temporary purposes."

The learned Judge then cited, with approbation, *The Jonge Klassina*, 5 *C. Rob. Adm. Rep.* 297, and Judge Story's remarks in *Livingston and Gilchrist* v. *Maryland Insurance Company*, 7 *Cranch*, 542, and proceeded—

" It seems to me not to admit of a doubt that, by the " well-understood law of nations, the facts disclosed in " this case, and the absence of all proofs that Kraffts was " here temporarily, or that he intended to return at any " future time to St. Bartholomew's, are decisive that *he* " *had an indefinite intention to remain here*; and especially

(*s*) *The Bernon*, 1 *C. Rob. Adm. Rep.* p. 102.

" as he was actually engaged in superintending the busi-
" ness of his house in their concerns in this country. The
" warrantry is therefore broken and falsified. The property
" insured would have been liable to belligerent capture
" and condemnation."

CCCIV. The following observations of Lord Stowell are worthy of the most careful attention. He says—" Of
" the few principles that can be laid down generally, I
" may venture to hold that time is the grand ingredient
" in constituting Domicil. I think that hardly enough is
" attributed to its effects; in most cases it is unavoidably
" conclusive: it is not unfrequently said that if a person
" comes only for a special purpose, *that* shall not fix a
" domicil. This is not to be taken in an unqualified
" latitude and without some respect had to the time
" which such a purpose may or shall occupy; for, if the
" purpose be of a nature that *may probably*, or *does*
" *actually*, detain the person for a great length of time, I
" cannot but think that a general residence might grow
" on the special purpose. A special purpose may lead a
" man to a country where it shall detain him the whole
" of his life. A man comes here to follow a lawsuit: it
" may happen, and indeed is often used as a ground of
" vulgar and unfounded reproach (unfounded as matter
" of just reproach, though the fact may be true) on the
" laws of his country, that it may last as long as himself.
" Some suits are famous in our judicial history for having
" even outlived generations of suitors. I cannot but think,
" that against such a long residence, the plea of an
" original special purpose could not be averred: it must
" be inferred in such a case that other purposes forced
" themselves upon him, and mixed themselves with his
" original design, and impressed upon him the character
" of the country where he resided. Suppose a man comes
" into a belligerent country at or before the beginning of
" a war: it is certainly reasonable not to bind him too
" soon to an acquired character, and to allow him a fair

" time to disengage himself; but if he continues to reside " during a good part of the war, contributing by payment " of taxes and other means to the strength of that country, " I am of opinion that he could not plead his special pur- " pose with any effect against the rights of hostility. If " he could, there would be no sufficient guard against the " fraud and abuses of masked, pretended, original and " sole purposes of a long-continued residence. There " is a time which will estop such a plea; no rule can fix " the time *à priori*, but such a time there *must* be. In " proof of the efficacy of mere time, it is not impertinent " to remark that the same quantity of business which " would not fix a domicil in a certain space of time, would " nevertheless have that effect if distributed over a larger " space of time. Suppose an American comes to Europe " with six contemporary cargoes, of which he had the " present care and management, meaning to return to " America immediately: they would form a different case " from that of the same American coming to any par- " ticular country of Europe with one cargo, and fixing " himself there to receive five remaining cargoes, one in " each year successively. I repeat that time is the great " agent in the matter: it is to be taken in a compound " ratio of the time and the occupation, with a great " preponderance of the article of time: be the occupation " what it may, it cannot happen but with few excep- " tions, that mere length of time shall not constitute a " domicil" (*t*).

CCCV. It is true that these observations are directly applied to the case of a *commercial* Domicil in the time of war, which may be more easily acquired than a *testamentary* Domicil; and the proposition, that "a general " residence may grow on a special purpose," if intended—from the context, the analogy of the lawsuit, and the absence of any qualification—to be holden as universally

(*t*) *The Harmony*, 2 *C. Rob. Adm. Rep.* pp. 324-6.

true of all kinds of domicil (*u*), cannot be so considered in England after the case of *Hodgson* v. *De Beauchesne* (*x*).

CCCVI. The following dicta of the American judges upon this point are worthy of observation:—"In questions "on this subject, the chief point to be considered is the "*animus manendi*, and Courts are to devise such reason- "able rules of evidence as may establish the fact of inten- "tion. If it sufficiently appear that the intention of "removing was to make a permanent settlement, or for "an indefinite time, the right of domicil is acquired by a "residence even of a few days" (*y*). Again, "Every man "is viewed by the law of nations as a member of the "society in which he is found. Residence is *primâ facie*

(*u*) "Quodnam autem temporis spatium, aut quantus annorum numerus ad hanc diuturnitatem requiratur, doctores valdè inter se digladiantur. Plerique judicis arbitrio id relinquunt, ut ex loci et personarum conditione ac qualitate vel breviori vel longiori termino dijudicet (*Zangerus* and *Menochius* are here cited and compared with *Mascardus* and *Mævius*). Quidam existimant etiam solo decennio domicilium contrahi, et ad hoc probandum adducunt 2 *C.* De incolis, cui hanc rationem jungunt, quod per diuturnum tempus, decem scilicet annorum, domicilium præscriptum esse censeatur.—*Ernest. Cothm.* vol. i. resp. 21, b. 4, et *Warmser*, exerc. 4, q. 10, p. m. 152. Qui etiam argumentis Zangeri ita respondet: '*Non imus inficias, minori etiam tempore domicilium constitui posse, ita tamen ut aliæ conjecturæ et circumstantiæ tacitè contracti domicilii concurrant. Tunc autem non tam ex temporis ratione, quam potius ex ipsis conjecturis et circumstantiis tacitè contractum æstimabitur. Verum impræsentiarum quando quæritur, an decennium ad contrahendum domicilium necessarium sit; aliis conjecturis minimè opus est, sed sufficit solius temporis decursus.*' Sed priorem sententiam tutiorem esse arbitratur etiam *Du Carpsov.* l. ii. t. ii. resp. 22, n. 5."—*Tractatio de Domicilio Eberhardina* A.D. 1663. Tubingæ.

"Lorsqu'on ne connoît pas la cause pour laquelle quelqu'un est allé demeurer ailleurs qu'au lieu de son domicile, sa volonté d'y transférer son domicile peut se prouver, tant par la longueur du temps qu'il a commencé d'y demeurer, que par d'autres circonstances, qui sont laissées à l'arbitrage du juge."—*Pothier, Introd. Gén. aux Coutumes*, chap. i. s. 15.

(*x*) 12 *Moore's P. C. Rep.* p. 285.

(*y*) 3 *Peter's Condensed Reports of Cases in the Supreme Court of the United States*, p. 172 (Note to *The Frances*, Boyer master); reported also, 8 *Cranch*, p. 363. See also *The Diana*, 5 *C. Rob. Adm. Rep.* p. 60.

"evidence of national character: susceptible, however, "at all times, of explanation. If it be for a special pur- "pose, and transient in its nature, it shall not destroy the "original or prior national character; but if it be taken "up *animo manendi*, then it becomes a domicil, super- "adding to the original or prior character the rights and "privileges, as well as the disabilities and penalties, of a "citizen—a subject of the country in which the residence "is established" (*z*).

CCCVII. And in another case it was laid down, "An "inhabitant, or resident, is a person coming into a place "with intention to establish his domicil or permanent re- "sidence, and in consequence actually resides. The time "is not so essential as the intent, executed by making or "beginning the actual establishment, though it is aban- "doned in a longer or shorter period" (*zz*).

CCCVIII. So, in the case of *Stanley* v. *Bernes*, the declarations of Mr. Stanley of his intention to return to England were outweighed by his residence of fifty years in Portugal (*a*).

CCCIX. The object of the residence in these cases was not special, the purpose was not temporary, so as to bring it within the rule of the civilians, exempting all such cases from the application of the legal presumption of domicil. The merchant engaged on a special and limited venture; the student who resides for the sake of prosecuting his studies; the individual detained by the prosecution of a lawsuit; the officer employed by the State in a particular service, all fell under this exception of the civilians (*b*),

(*z*) See *Johnson* v. *Sundry Articles of Merchandise*, 6 *Hall's American Law Journ.* p. 68. Cited in 3 *Peter's Condensed Rep.* p. 173.

(*zz*) *United States* v. *The Penelope*, cited 3 *Peter ubi sup.*

(*a*) 3 *Haggard's Eccl. Rep.* p. 373. *Suprà*, §§ ccxc. ccxci.

(*b*) "Et primum dicendum est *habitationem* et *domicilium* inter se differre. Nam *domicilium* habere quis dicitur in loco qui animo ibi commorandi perpetuò habitat. Is verò qui pro emptione aliquâ ex causâ, puta studiorum, vel litis, vel simili, commoratur, *habitare* dicitur."—*Menochius, De Præsumpt.* lib. vi. Præs. xlii., (p. 799).

because they were holden to retain their intention to return to their Domicil of Origin.

CCCX. When Grotius (*c*) is commenting on the opinion of the civilians, that ten years constitute a legal presumption of domicil, he observes, that this applies to cases of doubt; but if the intention to adopt a new domicil was made evident, a single moment sufficed for the creation of a new domicil. And it should also be observed that, if the person who came to a country for a special purpose, continued to reside there after the object of the special purpose was satisfied—e.g. the student after the prescribed time of attendance at the university was over; the merchant after his venture was made—then a counter presumption arose that the person so remaining intended to adopt a new domicil.

CCCXI. Still the question has been agitated whether length of time may not establish a new domicil, even in cases where the intention has been already declared of not abandoning the Domicil of Origin.

CCCXII. Upon this point there would be, perhaps, some variety of opinion, and some difference between the decisions of European and English jurists.

CCCXIII. It has been said by some civilians, that where a person retained the intention of returning to his former domicil, a thousand years would not suffice to establish a new one. "So" (says Mascardus (*e*), himself no mean authority) "I was taught by the chief of all inter-"preters of the law, by Bartolus."

CCCXIV. Locré, it has been already remarked, speaks of a case decided by the Parliament of Paris, that a

(*c*) See *Odwin* v. *Forbes*, Appendix, p. 198. Neither again is it any objection, "quod decennio quæratur domicilium," since it does not thence follow, "quod minore tempore non quæratur: sed quod in dubio decennium per se sufficit ad probandum domicilium. Alioqui, si de voluntate appareat, vel uno momento, domicilium constitutum intelligitur."

(*e*) "Amplius secundo loco limitabis ut non procedat, si ille haberet animum recedendi; etenim tunc etiam per mille annos non contrahitur

person who had been absent for forty years retained his domicil, by a correspondence intimating his intention to return (*f*).

CCCXV. The Judge of the Prerogative Court observed, "Length of time will not alone do it; intention alone will "not do; but the two taken together do constitute a "change of domicil. No particular time is required; but "when the two circumstances of actual residence and "intentional residence concur, then it is that a change of "domicil is effected" (*g*).

CCCXVI. The French and Sardinian Codes (*h*) have enacted "that a man's change of domicil shall be effected "by the fact of an actual (real) habitation in another

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domicilium, ut in scholare; sic me docuit juris interpretum Coryphæus, Bart. in l. *quæsit. in prin. ff. de Legat.* 3," &c.

Mascardus de Probat., Concl. DXXXV. 12, 13, (vol. i. p. 521).

"Nulla tempora constituunt domicilium aliud cogitanti."—*D'Argentré, Commentarii in patrias Britonum leges seu consuetudines generales Ducatûs Britanniæ*, Art. 449.

(*f*) *Législation Civile, Commerciale et Criminelle de la France*, tome iii. liv. i. titre iii. p. 414.

(*g*) *Collier* v. *Rivaz*, 2 *Curteis's Eccl. Rep.* p. 859.

(*h*) "Le changement de domicile s'opérera par le fait d'une habitation réelle dans un autre lieu, joint à l'intention d'y fixer son principal établissement." See articles 103-5 of the *Code Civil*, liv. i. t. iii. and *Locré's Législation de la France*, tome iii. *Code Civil*, pp. 414-47, where the discussion is set forth at length. Napoleon took an active part in it. "Le Premier Consul dit, qu'au premier mouvement la volonté n'est qu'un caprice, et qu'on ne peut regarder l'intention comme formée, que lorsqu'elle a été réfléchie, et qu'elle s'est maintenue pendant un temps suffisant pour qu'on puisse la croire solide; qu'ainsi on peut l'éprouver par un délai" (p. 413).

Cambacérès thought the question one of great difficulty, but inclined against fixing a definite period.

So the Sardinian Code enacted, "L' abitazione reale trasferita in un altro luogo, con intenzione di fissare in questo il principale stabilimento, produrrà cangiamento di domicilio."—*Codice Civile*, lib. i. t. iii. Del Domicilio, s. 67.

The modern Italian Code is to the same effect. "Il trasferimento della residenza in un altro luogo, coll' intenzione di fissarvi la sede principale, produce cangiamento di domicilio."—Art. 17.

" place, combined with the intention of fixing there his " principal establishment " (*i*).

CCCXVII. When this article was submitted to the French Council of State for adoption, a discussion took place upon the propriety of fixing a certain definite period, before the lapse of which a new domicil could not be acquired: but it was said to be provided for, as far as was practicable, by the words "*habitation réelle*;" and subsequent articles enacted that the law would consider as proof of intention, a declaration made to the municipality of the domicil abandoned, and to that of the domicil acquired; that, where no such declaration exists, the proof should depend upon circumstances.

[(*i*) So, too, the Dutch Civil Code, art. 75 : "De verandering van woonplaats zal stand grijpen door de werkelijke woning in eene andere plaats, gevoegd bij het voornemen om aldaar zijn hoofdverblijf te vestigen." And the principle has been adopted in modern codification. See *Código civil de la República Argentina*, lib. i. seccion i. tit. vi. art. 9 : " El cambio de domicilio se verifica instantáneamente por el hecho de la traslacion de la residencia de un lugar á otro, con ánimo de permanecer en él y tener allí su principal establecimiento." Edicion Oficial, 1870.]

CHAPTER XIV.

MISCELLANEOUS POINTS.

CCCXVIII. THERE are a few miscellaneous points which seem worthy of consideration before the subject of Domicil is brought to a conclusion.

CCCXIX. These miscellaneous points embrace the consideration of

1. Domicil in Factories.
2. Domicil under a Treaty.
3. Domicil in Mahometan Countries.
4. Domicil in a Country where it is regulated by Enactments of the Government.

I. DOMICIL IN FACTORIES.

CCCXX. It seems to be a well-established position of International Law, that the Original domicil is not lost by residence in a factory belonging to the countrymen of that domicil, but allowed to be established in a foreign country (*a*).

CCCXXI. Such factories are considered to be in the same category as the Ambassador's house, or the vessel of war in a foreign harbour, and to be protected by the same fiction of law—viz. that they are parts of the country which they represent.

CCCXXII. In the case of *The Danous*, however, a British-born subject, resident in the English factory at Lisbon, was allowed the benefit of a Portuguese character,

(*a*) *The Indian Chief*, 3 *C. Rob. Adm. Rep.* p. 28. *Vide infrà*, § cccxxxiv.

[Cf. *Tootal's Trusts*, *L. R.* 23 *Ch. D.* p. 532, as to a Chinese treaty port; and *Abd-ul-Massih* v. *Farra*, *L. R.* 13 *App. Ca.* p. 431.]

so far as to render his trade with Holland, then at war with England, but not with Portugal, unimpeachable as a legal trade (*b*).

CCCXXIII. In Smyrna, and other places in the Turkish dominions, [and at certain ports in China and Japan,] the control over and disposal of their property, its exemption from local municipal laws, and many other privileges, by which the laws of their own countries are preserved to them, are secured by treaty to European merchants (*c*).

II. DOMICIL UNDER TREATIES.

CCCXXIV. So the Original Domicil may be preserved by the effect of a treaty.

CCCXXV. Mr. Maltass was a British subject, born at Smyrna in 1764. When about six years of age, he was sent to England for his education, but returned to Smyrna at the age of fourteen. He made another visit to England in the year 1824, and remained there about two years. After his first return to Smyrna he served a clerkship in a mercantile house there, and finally established a house of trade there, under the name of J. and W. Maltass, in which house he was one of the partners at the time of his death in 1842. He left two wills, one dated October 22, 1841, the other, June 10, 1834.

CCCXXVI. The will of 1841 was not executed according to the provisions of the Wills Act in England (*d*); the will of 1834, having been made previous to that law, would have been holden a valid instrument in England.

CCCXXVII. The will of 1841 was first propounded in the Prerogative Court of Canterbury, and it was contended

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(*b*) 4 *C. Rob. Adm. Rep.* p. 255, n. 6.

(*c*) Upon the History of European Factories and Consulates, see an excellent and most laborious work, "*Manuel des Consuls,*" in two volumes, by *Alex. de Miltitz*, published in London and Berlin, 1837. [*Et vide suprà*, vol. i. chap. xix. and vol. ii. §§ cclxxii. et seq.]

(*d*) 1 *Victoria*, c. 26.

that British merchants in the Ottoman dominions were governed by a peculiar code (*e*) of civil and criminal law, which was neither that of England nor of Turkey, but framed upon the custom of the Levant with respect to European subjects in the Ottoman dominions (*f*). That, on the one hand, they were exempted by treaty from the Turkish Law, which allowed no will to be made by a Turkish subject, but divided his property between his relations in certain fixed proportions; and, on the other, they were not affected by the recent statute in England. That the will in question, being a holograph in the testator's own handwriting, was a valid instrument, according to the *jus gentium*, and according to the Law in England before the passing of the late statute.

CCCXXVIII. The Judge, however, held, "that if the "deceased was domiciled in Turkey, he could make no "will at all; if he was a British subject, he must make a "will according to the Testamentary Law in England:" and the allegation propounding the paper was rejected (*g*).

CCCXXIX. At a subsequent period the former will of 1834 was propounded; and it was pleaded, that by certain articles of peace between England and the Ottoman Empire, made and concluded at the Dardanelles in the year 1809, the property of any Englishman, or other subject to that nation, or navigating under its flag, who should happen to die within the Turkish dominions, should be given up to the persons to whom the deceased may have left them by will, or to the British Consul.

CCCXXX. The Judge held the admitted facts in the case to be these. That the deceased was born at Smyrna, of British parents; that he passed his boyhood in England for the purpose of his education; that he went back to

(*e*) See *Wheaton's Internat. Law* (Boyd's edition, 1880), part ii. ch. ii. §§ 110, 110 A.

Ruding v. *Smith*, 2 *Haggard's Consistory Rep.* p. 386.

(*f*) This was not pleaded, but contended in argument.

(*g*) 3 *Curteis's Eccl. Rep.* pp. 233-5.

Smyrna, where his father was engaged in trade; that he had been for many years occupied in commercial pursuits; and was a member of a firm established at Smyrna, but which was dissolved a considerable period before his death; that there was no positive evidence that the deceased had been engaged in trade during the latter years of his life; that he had married at Smyrna, was constantly resident there, and died there, leaving a widow and children. The Judge considered the deceased to be domiciled in England, but observed that his judgment did "not affect the ques-"tion of domicil, if the deceased was in the legal sense "domiciled in Turkey; and if the Law of domicil does "prevail, the Law of Turkey, in conformity with the "treaty, says that, in such case, the succession to personal "estate shall be governed by the British Law; if he was "not domiciled in Turkey, but in England, then the Law "of England prevails *proprio vigore*:" he, therefore, pronounced in favour of the will of 1834 (*h*).

CCCXXXI. The case of *Moore* v. *Darell* (*i*) was cited, in argument, by the counsel contending for the Turkish domicil of Mr. Maltass. In that case, a treaty was *pleaded* between Spain and England, by one article of which it was agreed that the goods of the subjects of one King who shall die in the dominions of the other, should be preserved for the lawful heir, and certain other privileges were granted; yet, nevertheless, Mr. Moore had been holden to be a domiciled Spaniard.

CCCXXXII. But in *Maltass* v. *Maltass*, the Judge observed: "As to the case of *Moore* v. *Darell*, I conceive "that my opinion does not militate against that case, or "the construction of the treaty with Spain. This Court "was of opinion that the will there propounded was in-"valid by the Law of Spain, and, though more doubtfully, "by the Law of England. It held that the deceased was

(*h*) 1 *Robertson's Eccl. Rep.* p. 80.
(*i*) 4 *Haggard's Eccl. Rep.* p. 350.

" domiciled in Spain, never mentioning the treaty. In-
" deed, not even in the argument was the treaty alluded
" to ; no allegation on that point was given in ; no answers
" were taken. The King's Advocate of the day declined
" to argue the point, and not a single word appears in
" that case upon the construction of the treaty " (*j*).

III. DOMICIL IN MAHOMETAN COUNTRIES.

CCCXXXIII. It was contended in the case of *Maltass* v. *Maltass*, that the European International Law of Domicil would not be applicable to the residence of Christian subjects in Mahometan countries.

CCCXXXIV. The following passage was cited from Lord Stowell's judgment in *The Indian Chief*: " It is to be
" remembered that, wherever a mere factory is founded in
" the Eastern parts of the world, European persons trading
" under the shelter and protection of their establishments,
" are conceived to take their national character from that
" association under which they live and carry on their com-
" merce. It is a rule of the Law of Nations, applying
" peculiarly to those countries, and is different from what
" prevails ordinarily in Europe, and the Western parts of
" the world, in which men take their present national
" character from the general character of the country in
" which they are resident; and this distinction arises from
" the nature and habits of the countries. In the Western
" parts of the world, alien merchants mix in the society of
" the natives ; access and intermixture are permitted ; and
" they become incorporated to the full extent. But in the
" East, from the oldest times, an *immiscible character* has
" been kept up ; foreigners are not admitted into the
" general body and mass of the society of the nation ;
" they continue strangers and sojourners as all their fathers
" were ; '*Doris amara suam non intermisceat undam* ;' not

(*j*) The learned Judge (Dr. Lushington) had been counsel in the cause.

" acquiring any national character under the general " sovereignty of the country, and not trading under any " recognised authority of their own original country, they " have been held to derive their present character from " that of the association or factory under whose protection " they live " (*k*).

CCCXXXV. With respect to establishments in Turkey, it was declared, in the case of Mr. Fremeaux, during the war of 1782, that a merchant carrying on trade at Smyrna, under the protection of the Dutch Consul at Smyrna, was to be considered as a Dutchman (*l*).

CCCXXXVI. The case of *The Angélique* was brought by appeal from the Prize Court before the Lords of Appeal, in the year 1801. " It was the case of a ship and " cargo taken on voyage from Madras to the Spanish set- " tlement of Manilla, and claimed on behalf of Armenian " merchants, resident in Madras. It was asserted on the " part of the claimant, that a trade of this nature had " been carried on by this peculiar class of merchants, " under the knowledge and permission of the Government " of Madras; and that it had in former wars also been a " trade specially privileged by the East India Company's " governing officers in India, and by the Spanish Govern- " ment at Manilla. It appeared, also, that there had " been a subsequent permission of the Governor of Madras, " Lord Clive, and of the Governor-General, Lord Mor- " nington, for the carrying on a similar trade, granted to " the claimant in this case—and the application stated " that it had been usual to trade in this manner, without " consulting Government; but that the application was " now made in consequence of the capture of *The Angélique*. " It was said further, that there was a legal opinion of " the Attorney-General of Madras, under a certificate " from Lord Mornington and Lord Clive, and the persons

(*k*) 3 *C. Rob. Adm. Rep.* pp. 28, 29.
(*l*) *Ibid.* pp. 29, 30.

" constituting the council at Madras, stating their opinion " of the legality of the trade, and representing the ex- " treme hardship of the case to the Vice-Admiralty Court " of the Cape of Good Hope."

CCCXXXVII. " After a very full hearing, the Court " of Appeal were of opinion that, by the general law, all " foreigners resident within the British dominions incurred " all the obligations of British subjects—that there was " nothing to distinguish this particular class of merchants, " in point of law, from the general rule; that, whatever " doubt might be entertained, whether the East India " Company might not, in wars in India originating with " them, under the power of their charter, relax the opera- " tion of war so far as to license the trade of individuals " with such an enemy, they could unquestionably have " no such power in respect to a trade carried on with a " general and public enemy of the Crown of Great Britain; " that it would on that account be useless to admit the " claimants to prove, as it was offered, the fact of a tacit, " or acknowledged, permission from the Governor in " Council in India. The Court seemed to admit that the " trade in question might be a very lucrative trade, in a " public point of view, as it was the means of carrying the " silver, received by the Armenian merchants in Manilla " for the exports of the Company's manufactures, on to " China, where it was vested as a fund for the purchases " made by the East India Company, the private merchants " taking in payment bills on the Company in India. " They thought that, on these grounds, there might, per- " haps, be reasons for making particular regulations in " future for such a trade; but, being of opinion that, as it " was in the power of the Crown alone to declare war, " so it rested with that authority only to dispense with " its operations, they affirmed the sentence of the Vice- " Admiralty Court, and condemned the ship and cargo as " the property of British subjects taken in trade with the " enemy.

"Being possessed with a conviction of the *bonâ fide* "conduct of the parties, and considering that they had "been led into a mistake, under a public misapprehension "prevailing in India, even on the part of the governing "persons there, the Court directed the expenses of the "suit to be paid out of the proceeds" (*m*).

CCCXXXVIII. The opinion of the Attorney-General at Madras, referred to in the above case, so far as it bears upon the present question, appears to have been as follows:—"In the year 1688, a treaty or agreement was "entered into between the Old Company and the Arme-"nian nation; by which the latter, in consideration of "their changing the ancient course of their trade to "Europe (till then carried on to a great extent by the way "of Turkey), and sending their goods on the Company's "ships to London, by which the customs were expected to "be greatly increased, were granted, within the Company's "limits, all the privileges enjoyed by British subjects; "and were licensed to trade to and from Europe in the "Company's vessels on equal terms. For many years "before this, they had had a free and uninterrupted trade "to Manilla (from which the Company were excluded by "the treaty of Madrid, in June 1670), and this commerce "was by the agreement allowed to be carried on directly "from the Company's settlements, in any ships which had "their permission to trade. Having been before received "as neutral subjects of Persia, or as temporary subjects "of the Mogul empire, the residence of some Armenian "families in the Company's factories was not, from the "nature of the factories, considered by the Spaniards as "a circumstance of sufficient weight to exclude them from "the port of Manilla, or a reason for depriving them of "their ancient advantages of trade, by treating them as "English subjects. It is now one hundred years since "the treaty or agreement was entered into, and during

(*m*) *The Angélique*, 3 *C. Rob. Adm. Rep.* Appendix B, p. 7.

" that period the Armenians have continued to be received " at Manilla, as they had at all times before, as subjects " of Persia or the King of Delhi: and in the various wars " we have had with Spain since 1688, though coming " directly from our ports, they have uniformly been con- " sidered and treated by the Spaniards as a neutral " nation " (*n*).

CCCXXXIX. In the case of *Maltass* v. *Maltass*, the factory was not pleaded; but Lord Stowell's expressions were relied upon to prove that no Christian could acquire a domicil by residence in a Mahometan country; that " the immiscible character " (*o*) (to borrow his happy expression) would prevent the acquisition of a domicil.

CCCXL. The learned Judge who decided the case of *Maltass* v. *Maltass* observed, " I give no opinion, therefore, " whether a British subject can or cannot acquire a Turkish " Domicil; but this I must say—I think every presump- " tion is against the intention of British Christian subjects " voluntarily becoming domiciled in the dominions of the " Porte. As to British subjects, originally Mussulmen, as " in the East Indies, or becoming Mussulmen, the same " reasoning does not apply to them, as Lord Stowell has " said does apply in cases of a total and entire difference " of religion, customs, and habits " (*p*).

(*n*) 3 *C. Rob. Adm. Rep.* App. B. pp. 7-9, and note to p. 7.

(*o*) In another case Lord Stowell said, " It has been argued that it would be extremely hard on persons residing in the kingdom of Morocco, if they should be held bound by all the rules of the Law of Nations, as it is practised amongst European States. On many accounts, undoubtedly they are not to be strictly considered on the same footing as European merchants; they may on some points of the Law of Nations be entitled to a very relaxed application of the principles established by long usage between the States of Europe holding an intimate and constant intercourse with each other," &c.—*The Hurtige Hane*, 3 *C. Rob. Adm. Rep.* p. 325.

(*p*) *Maltass* v. *Maltass*, 1 *Robertson's Eccl. Rep.* p. 80. See interlocutory remarks of the Judge of the Prerogative Court, as to domicil in the settlement at Hudson's Bay.—*In the goods of Sutherland*, 4 *Notes of Cases*, pp. 561-3.

IV. DOMICIL, WHERE IT IS REGULATED BY THE STATE.

CCCXLI. Where the Government of a country prescribes a certain form, whereby a stranger shall be admitted to establish his domicil therein, and to enjoy all the civil rights of a native subject, can a stranger, without the permission of Government, acquire a domicil in such country?

CCCXLII. In France, where such a law exists (*q*), the question—so far as it relates to rendering the person so domiciled *justiciable* by a French tribunal—has been judicially decided in the affirmative. On the 25th of March, 1819, B., banker of Amsterdam, but residing at Paris, was condemned to pay E., banker of Paris, 251,782 francs, by the Tribunal of Commerce at Paris. B. refused obedience to the order, and was imprisoned. He then demanded to be set free, chiefly because, being a stranger, he could not have a domicil in France without the royal authority, and the proceedings having treated him as domiciled, were therefore null. The case was decided against him in the Civil Tribunal of the Seine, in the "Cour Royale" of Paris, and in the "Cour de Cassation" (the last Court of Appeal), on the ground that a stranger could have a *de facto* domicil and residence, although according to the 13th article of the Code Civil he could not have a domicil *de jure* without the authority of Government (*r*), and could not enjoy the privileges of a domiciled subject.

CCCXLIII. This case only established that a person so domiciled was *justiciable* by the French tribunal; but the reasoning of it seems equally valid to prove that a

[(*q*) *Code Civil*, art. 13. "L'étranger, qui aura été admis par l'autorisation du Président de la République à établir son domicile en France, y jouira de tous les droits civils, tant qu'il continuera d'y résider."]

(*r*) *Merlin, Rép. de Jur.* Domicile XIII. The case cited is in *Merlin, Questions de Droit* (tome v. p. 431). Domicile V. As to Merlin's supposed change of opinion as shown in edit. of 1828 [see *Bremer* v. *Freeman*, 10 *Moore's P. C. Rep.* at pp. 371, 372.] Cf. *Merlin, Rép.* Étranger I. ss. 9, 10, and Testament, sect. i. § v. arts. 1, 2.

principal domicil may be *de facto* acquired by a person who was not himself entitled to the privileges of a domiciled subject. Nevertheless, as will presently be seen, this proposition is very far from being incorporated into the administration of French Law: it would perhaps rather seem that the contrary proposition has obtained the sanction of the highest French authorities.

CCCXLIV. The case of *Collier* v. *Rivas* appears to support this conclusion. In that case, the testator (Mr. Ryan), an English-born subject, died *de facto* domiciled in Belgium, leaving a will executed before 1830, that is, at a time when the Code Napoléon was in force in Belgium and Holland, then one kingdom; the will was valid according to the English, but not according to the Belgian Law; but the testator had not obtained the prŏper authority requisite for the establishment of such a domicil as would entitle him to civil rights in the kingdom of the Netherlands. Two advocates, one practising in Holland, and one in Belgium, deposed to the effect that, "the suc-"cessions of persons—who, however long they might have "been resident, not having obtained the royal authority "to reside there, being considered as mere foreigners—"would be governed by the laws of their own country, "and would be upheld by the Courts of Belgium, if those "Courts were called on to decide." The Court in England, finding, upon the evidence of these two advocates, that the foreign country in which the testator was domiciled would uphold his testamentary disposition, decreed probate of the same (*s*).

CCCXLV. The following remarks, however, of the Judge who decided the foregoing case are worthy of attention:—"Now (*t*) three witnesses have been examined "with respect to the Law of Belgium, as applying as well "to the acquiring of a domicil in Belgium as to the law

(*s*) *Collier* v. *Rivaz*, 2 *Curteis's Eccl. Rep.* p. 855.
(*t*) *Ibid.* pp. 859-60.

" with respect to the execution of testamentary instru-
" ments."

" With respect to Domicil acquired, it is quite clear,
" according to the evidence of these persons, that no
" domicil, according to the Law of Belgium, can be
" acquired, unless the authority of the ruling powers is
" obtained to authorize the persons who apply for that
" authority to continue in that country; that, unless that
" authority is obtained, he is liable to be removed at any
" time; that, having obtained that authority, he then
" becomes to all intents and purposes a subject of Belgium,
" and has a right to remain there and enjoy the privi-
" leges of a natural born subject. But it may be a
" different question whether a person who has not
" obtained that authority—a mere resident there—is to
" be considered as a foreigner, simply having a residence
" and not a domicil. I think it is very doubtful whether
" the Dutch and Belgian lawyers understand the same
" thing, from the evidence given with respect to Domicil—
" whether they do not consider that a person, to become
" domiciled, must have denization, that which is equiva-
" lent to our naturalization, and they do not mean simply
" domicil for the purpose of succession or anything of
" that description, but they consider that a person, in
" order to become domiciled, must place himself by the
" authority of the Government in the same situation as a
" Belgian subject, and have the rights and privileges of
" that country. But I think it is not necessary to inquire
" into this, because I think we have the conclusive evi-
" dence of two witnesses as to that which is necessary
" to give validity to the testamentary dispositions of
" persons who reside there, but have not acquired all the
" rights of Belgian subjects."

CCCXLVI. The authority of this decision in *Collier* v. *Rivaz* might appear to be shaken by the judgment of the Privy Council in *Bremer* v. *Freeman*: and yet this last decision will be found, on examination, to have done

little or nothing towards the adjustment of this vexed and difficult question.

In *Bremer* v. *Freeman*, the testatrix, an English lady domiciled *de facto* at Paris, made her testament in the English form, disposing of property which was, with an inconsiderable exception, entirely English or Anglo-Indian.

The testament was ultimately pronounced to be invalid as far as it related to personalty, while it was admitted to be valid in its relation to freehold property in India. The Prerogative Court of Canterbury had decided that the testament was a valid disposition of personalty. This sentence was reversed by the Judicial Committee of the Privy Council.

The principal arguments in favour of the testament were, that the testatrix was not domiciled in France according to the French Code, and therefore was not domiciled *de jure* there at all; that the *testamenti factio* was a matter *juris positivi* or *civilis*, and not *juris gentium* —that Pothier (*u*) had expressly declared so; that the French Code did not admit the foreigner domiciled without *autorisation* to *civil* French rights; that the Law of England adopted in these cases the Law of France, and that, according to the French Law, the English Law governed the testament.

The principal argument against the validity of the testament was, that by Domicil in these cases was meant Domicil *de facto*, and according to the general *jus gentium* or *lato sensu*, and not *de jure* or according to the positive provisions of a particular code upon the subject. It was conceded that the Law of England did adopt

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(*u*) "Il est vrai que ces personnes ne sont pas capables du droit civil, qui n'a été établi que pour les citoyens, tel que le droit des testaments, des successions, du retrait lignager; mais elles sont capables de ce qui appartient au droit des gens, telles que sont toutes les conventions."—*Traité de la Communauté*, part i. chap. i. art. i. § 21.

the Law of France (*w*); but it was contended that this law pronounced the testament invalid because it was executed by a person domiciled *de facto* in France, and not according to the forms prescribed by the French Law.

French advocates and jurists of great eminence were examined by both parties to the suit, for the purpose of proving the French Law to be as respectively alleged by them.

A great number of decisions (*x*) also were cited by both parties for the same purpose (*y*). It is a maxim of English Law that foreign Law must be proved as a *fact* in each case, though the practice has varied as to how far it is competent to the judge to form his own opinion from the perusal of writings of authority, whether Codes of Law or treatises on jurisprudence (*z*).

The result of the foreign evidence taken in this case was certainly embarrassing. The opinions of the French advocates were directly at variance with each other. The judicial precedents were equally conflicting.

And—what worse confounded the confusion to the English judges—some of the French lawyers who deposed

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(*w*) It does not seem certain whether in the simple case of a *de facto* domicil of an Englishman in a foreign State, the English Court would ascribe any weight to the opinion of foreign *experts* as to what constituted a *de facto* domicil according to the law of the foreign State. The practice on this case has not been uniform.

(*x*) It was contended by the party setting up the validity of the testament that an investigation of these decisions would show that they were, in fact, all opposed to the French domicil: there were exceptions; but these ranged themselves generally under two heads: 1. Where *French interests* were concerned—a strange, but I fear undoubted, exception; 2. Where both parties had *consented* to the fact of the domicil, and the dispute had arisen upon some collateral or emergent matter.

(*y*) The authorities of both kinds will be found collected together in the report of the case in the Prerogative Court, *Deane's Rep.* pp. 198, 202, and of the case before the Privy Council, 10 *Moore's P.C. Rep.* pp. 312-374.

(*z*) *Vide post*, chap. xlv.

against the validity of the testament, founded their opinion entirely on the maxim *locus regit actum*, and not upon the domicil being French.

The Judicial Committee of the Privy Council considered that they were sitting as a French Court, to decide upon a question of French Law. Their Lordships said:—

"This domicil being established in evidence, the "burden is thrown on the respondent to prove that the "will, in the English form, is sanctioned by the Municipal "Law of France. He must show, upon the balance of "the conflicting evidence in the cause, that the wills of "persons so domiciled, in that form, are allowed by that "Law. This is the important question, and the only one "of any difficulty in the case. Much evidence was pro-"duced of the Law of France on both sides; the *vivâ voce* "testimony of experts in the science and practice of the "law, vouching and referring to the Code Napoléon de-"crees, and to known treatises. Some of these last have "been since brought forward and referred to without "objection on either side; and their Lordships have to "decide on the whole of this (for the most part) very un-"satisfactory, confused, and conflicting evidence, whether "they are convinced that this will, executed in France in "the English form, is valid.

"On the part of the Respondent, five persons, prac-"tising in the French Courts, stating themselves to be "experienced in the Law of France, were examined: on "the part of the Appellant, three. It is to be lamented "that, from the very nature of the case, we cannot satisfy "ourselves by the personal examination of these witnesses "as to the weight due to each of them; and a proper "sense of professional delicacy precludes them from "giving evidence as to the merits of each other. We are "compelled, therefore, to decide the disputed question "with inadequate means of judging of their professional "eminence, their skill, and knowledge. It is to be re-

" marked, speaking with all respect to those gentlemen, " that the rule of International Law which all English " lawyers consider as now firmly established, namely, that " the form and solemnities of the testament must be " governed by the Law of the domicil of the deceased, does " not appear to be recognized, or at least borne in mind, " by any of them. Nay, in *Quartin's* case, both the Cour " Royale and the Cour de Cassation expressly decided that " the will must be in the form and with the solemnities " of the place where it is made, on the principle that " *locus regit actum* (*a*): an error which is ably exposed, " in the opinion of M. Target, in the *Duchess of Kingston's* " case (Coll. Jur. p. 323). The three witnesses called for " the Appellant, Messrs. Frignet, Senaed, and Paillet, all " maintain the same doctrine. If this position were really " true, the case of the Appellant would prevail; but the " other witnesses do not maintain the same doctrine. Of " the five experts examined for the Respondent, three, " Messrs. Blanchet, Hebert, and De Vatismesnil, all think " that the will, either in the form required by the Law of " the Domicil of Origin, or the place where the party " dwells, is valid; a position which, by English lawyers, " is certainly now considered to be exploded since the case " of *Stanley* v. *Bernes*" (*b*).

CCCXLVII. It is manifest that a judgment pronounced

(*a*) The extent to which this principle prevails on the Continent could scarcely have been present to their Lordships' minds. "Actui lex formam dat" (says *Hertius*) "quando negotium aliquod ad usum civitatis certis circumscribit solemnitatibus, puta cum de loco, de tempore, de modo actûs statuit, e.g. ut *testamenta his aut illis solemnitatibus fiant*," &c.—*De Coll. Leg.* s. 4, p. 7. "Or che dire" (says *Rocco*) "se lo straniero intenda fare nel regno alcun contratto con altri pur forestiero ovvero con qualcuno de' nazionali nostri, *e voglia delle sostanze sue disporre per via di testamento*? . . . Il principio generale cui fa uopo trarre dietro è, doversi seguitare le formalità del luogo ove l' atto si celebra: *locus regit actum*."—*Rocco*, p. 144 (lib. ii. cap. 7).

(*b*) 3 *Haggard's Eccl. Rep.* p. 373; *Bremer* v. *Freeman*, 10 *Moore, P. C. Rep.* pp. 361-362.

upon "very unsatisfactory, confused, and conflicting evi- "dence," can constitute no precedent for any other case, and that the whole question still remains open for discussion.

An unsuccessful attempt was made to oppose the practical execution of the sentence by tendering proof that it was not what it purported to be—a correct exposition of the French Law. For the purpose of obtaining this proof, the President of the Civil Tribunal of the Seine was requested by the defeated party to name the French advocates most competent to form an opinion as to whether the sentence of the English Privy Council did or did not correctly expound the French Law. He named ten gentlemen. The admitted facts of the case were laid before them, and they unanimously declared that the will was valid, and not invalid, according to the French Law.

This evidence, however, which was taken *ex parte*, and after the sentence had been pronounced, was not permitted to be produced before the Privy Council; but, nevertheless, it is not improperly mentioned in this place (*c*): though, of course, it is open to the observation that the other side might possibly have produced an equal amount of testimony in support of the sentence.

CCCXLVIII. The foreign jurist was, no doubt, surprised to learn that the maxim *locus regit actum*, which he had always considered as incontrovertible, was erroneous when applied to the form of testaments, though correct when applied to the form of contracts. The truth is, that the English lawyers and judges early committed themselves to the opposite maxim; and, true to the English rule of adhering to what has been once determined, have never been able to escape from the fetters which they had, with less knowledge than they now possess of Foreign and Roman Law, imposed upon themselves. On the other hand, the English lawyers and judges must have learnt,

(*c*) See note at the end of this chapter, p. 240.

with at least equal amazement, the little value which French tribunals, even of the last resort, attached to judicial precedent. A French lawyer deposed, as a witness, to the comparatively insignificant effect of mere judicial precedents upon subsequent cases, and on being asked by the perplexed English lawyer "What are your judicial decisions then good for?" received the concise and remarkable answer, "They are good for those who "get them." Never were the opposite characteristics of the legal mind of the two countries more clearly shown, and perhaps, it might be added, the defects of both: the obstacle to the melioration of law presented by the inflexible adherence to a judicial precedent on the one hand; and on the other, the great uncertainty of law arising from the disregard of judicial precedent, and the habit of applying an independent consideration of law, as well as fact, to every case which is brought into a court of justice. I have thought it expedient to leave the mention of *Collier* v. *Rivaz*, and *Bremer* v. *Freeman*, as they were in the former edition of this volume. But to the English lawyer these cases have now ceased to have any practical interest: because the decision in *Bremer* v. *Freeman* having manifestly led to the defeat of a testator's intentions, Lord Kingsdown was induced to bring into Parliament a Bill, which became the 24 & 25 Vic. c. 114, the provisions of which, it will be seen, are most important (*e*).

CCCXLIX. It was, perhaps, rather taken for granted in *Bremer* v. *Freeman*, that an individual who *has* complied with the forms prescribed by the Law of a foreign State for the attainment of domicil, becomes, unquestionably, domiciled in that State. But Rocco (*f*), no mean

(*e*) Cf. chapter xliii. §§ dcccIxiv., dcccIxiv. A, where this statute is set out.

(*f*) "E può in fine accadere che il forestiero, come che ammesso a stabilir nel regno il domicilio, non abbia per tanto inteso di abbandonare l' antico; abbia mai sempre serbato la intenzione di far ritorno nella sua patria."—p. 148.

authority, says that this is not necessarily true; that an individual may have complied with this prescribed form, and have enjoyed all civil privileges appertaining thereto, and yet have retained his ancient domicil: the *animus revertendi* to which may never have deserted him.

The foreign jurist has always ascribed more weight than the English jurist to *intention*, as the principal ingredient of Domicil; and the instance just cited affords, perhaps, as strong an illustration as could be furnished, of the preponderating influence of this element in continental jurisprudence.

[CCCXLIX.A. In *Hamilton* v. *Dullas* (*g*), a case decided by Vice-Chancellor Bacon in 1875, it was held that an Englishman might acquire in France a domicil determining the succession to personalty as to which he died intestate, although he had never been admitted by the authorisation of the President of the French Republic to the privileges of a French domicil in accordance with the *Code Civil*, tit. i. art. 13.]

CCCL. We cannot close these observations on the operation of the French Code upon the general Law of Domicil, without adverting to a remarkable passage in the *last* edition (1828) of *Merlin's Répertoire de Jurisprudence.*

After observing that the question no longer presented itself under the *Code Civil*, at least upon the wills of Frenchmen, he says:—

"But the question remains open (*entière*), in respect to "holograph wills made in France, by foreigners domiciled "in countries where the laws do not admit that mode "of making a will, *and by which they dispose of property* "*situate in those countries*: ought the tribunals of those

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"A dir brieve, egli userà nel regno di tutti que' diritti, i quali non tengono allo stato della persona; e fra quelli e che il riguardano, il godimento o la privazione ne verrà regolata secondo le norme del vero suo domicilio."—p. 155.

[(*g*) *L. R.* 1 *Ch. D.* p. 257.]

"countries to declare them valid according to French "Law, or to annul them according to the Domiciliary "Laws of the testator?" (*gg*)

Here the question on Merlin's mind was, not whether the foreign court would recognize as valid the will of a foreigner made according to the forms of his Personal Statute, which follows him wherever he goes, but whether the foreign Court would recognize as valid the will of a foreigner made in the holograph form, where his own Laws do not admit it.

CCCLI. Another question of difficulty might arise from the regulation of the Law of domicil by the State. Suppose that the Government of a country, Russia for instance, forbade its subjects to establish a domicil out of their native land, and a subject nevertheless *de facto* established a domicil in a foreign country, and died there, what law would the country in which he died apply to the distribution of his personal property—that of the country of his domicil *de jure*, or of his domicil *de facto*? It should seem the Law of the domicil *de facto* (*h*), but the case would be open to some argument on the other side (*i*).

(*gg*) Vol. xxxiv. p. 118. *Testament*, Sect. II. § iv. Art. 2.

(*h*) *Vide antè*, § xliii. and *note* (*z*), as to the peculiarity of the custom of London prevailing over the Law of the Domicil.

(*i*) According to the Sardinian Code, no domicil in a foreign country, however long and permanently established, would, of *itself*, avail to prove that the person establishing it had abandoned the intention of returning to his native country, and so incurred the forfeiture of his civil rights. (*Codice Civile*, lib. i. tit. i. c. ii. Della privazione dei diritti civili, s. 34.)

[Under the Italian Civil Code, Art. 11,

"La cittadinanza si perde:

"1. Da colui che vi rinunzia con dichiarazione davanti l'uffiziale dello stato civile del proprio domicilio, e trasferisce in paese estero la sua residenza;

"2. Da colui che abbia ottenuto la cittadinanza in paese estero;

"3. Da colui che, senza permissione del governo, abbia accettato impiego da un governo estero, o sia entrato al servizio militare di potenza estera."

See, too, Art. 17.]

NOTES ON THE FOREGOING CHAPTER.

I.

The cases on Domicil have of late years been very numerous, both in the English, Irish, and Scotch Reports, and in those of the United States of America; but in many of them no new principle or new application of old principle is contained.

The reader will find a great collection of American cases in *Curtis' United States Digest*, vol. ii. p. 102, and *Putman's U. S. Digest*, vol. v. p. 153; he may also refer to [*Lamar* v. *Micon*, *Davis' U. S. A. Supreme Court Rep.* vol. v. p. 452; vol. vii. p. 218, and to] the following English cases not expressly quoted in the preceding pages:—

Attorney-General v. *Napier*, 6 *Exchequer Reports*, p. 217.

Laneuville v. *Anderson*, 17 *Jurist*, p. 511, 2 *Spinks's Rep.* p. 53, 9 *Moore's P. C. Rep.* p. 325.

In re Wright's Trusts, 25 *Law Journal* (*Chancery*), p. 621; 2 *Kay & Johnson's Rep.* p. 575.

Cockerell v. *Cockerell*, 2 *Jurist*, N. S. pp. 621, 727.

Hoskins v. *Matthews*, *ib.* p. 216.

Attorney-General v. *Fitzgerald*, 3 *Drew's Reports*, p. 610.

Forbes v. *Forbes*, 1 *Kay's Rep.* p. 341.

M'Cormick v. *Garnett*, 4 *De Gex, M. & G.'s Rep.* p. 278.

Brown v. *Smith*, 15 *Beavan's Rep.* p. 448.

Robins v. *Paxton and Dolphin*, 30 *Law Times*, p. 310.

Enohin v. *Wylie*, 31 *Law Times*, p. 171.

Whicker v. *Hume*, 7 *H. L. Cases*, p. 159, 4 *Jurist*, N.S. p. 933.

Re Dons's Estate, before V.-C. Kindersley (1858).

Re Muir, deceased (1859).

Lord v. *Colin* (1859).

Re Bernard Mette, deceased (1859).

Campbell v. *Beaufoy* (1859).

Hoskins v. *Matthews*, 8 *De G., M. & G.* p. 13.

Re Steer, 28 *L. J. Exch.* p. 22.

Shaw v. *Gould*, *L. R.* 3 *H. L.* p. 55.

Bell v. *Kennedy*, *L. R.* 1 *Scotch and Divorce App.* p. 307.

Udny v. *Udny*, *L. R.* 1 *Scotch and Divorce App.* p. 441.

Haldane v. *Eckford*, *L. R.* 8 *Eq.* p. 631.

Douglas v. *Douglas*, *L. R.* 12 *Eq.* p. 617.

Stevenson v. *Masson*, *L. R.* 17 *Eq.* p. 78.

Sharpe v. *Crispin*, 38 *L. J. Prob.* p. 17; *L. R.* 1 *Prob. and Divorce*, p. 611.

[*Brunel* v. *Brunel*, *L. R.* 12 *Eq.* p. 298.
King v. *Foxwell*, *L. R.* 3 *Ch. D.* p. 518.
Platt v. *Attorney-Gen. of N. S. Wales*, *L. R.* 3 *App. Ca.* p. 336.
Doucet v. *Geoghegan*, *L. R.* 9 *Ch. D.* p. 441.
In re Tootal's Trusts, *L. R.* 23 *Ch. D.* p. 532.
Ex parte Cunningham, *L. R.* 13 *Q. B. D.* p. 418.
Bradford v. *Young*, *L. R.* 29 *Ch. D.* p. 617.
Patience v. *Main*, *L. R.* 29 *Ch. D.* p. 976.
The Lauderdale Peerage, *L. R.* 10 *App. Ca.* p. 692.
Paxton v. *Macreight*, *L. R.* 30 *Ch. D.* p. 165.
Attorney-General v. *Alexander*, 23 *Weekly Reports*, p. 255.
Re Marratt; *Chalmers* v. *Wingfield*, *L. R.* 36 *Ch. D.* p. 400.
Cooper v. *Cooper*, *L. R.* 13 *App. Ca.* p. 88.
Abdallah v. *Rickards*, decided by Chitty J. June 6, 1888.
Abd-ul-Messih v. *Farra*, *L. R.* 13 *App. Ca.* p. 431.]

II.

In *Bremer* v. *Freeman*, the following authorities on Foreign and French Law were cited :—

WRITERS.

Nicolas Gaillard in Dalloz, Jurisprudence Générale (1851), Pt. I. p. 38.
Coin de Lisle, Comment. Analyt. du Code Civil, p. 35.
Troplong, Le Code Expliqué, tome xviii. p. 378.
Pardessus, Cours de Droit Commercial, p. 773.
Duranton, Cours de Droit Français, tome i. pp. 95–291.
Demolombe, Cours de Code Civil, liv. i. tit. i. c. i. §§ 140, 141.
Demangeat, Condition Civile des Etrangers, p. 369.
Zachariæ, Cours de Droit Civil François, tome i. pp. 278–280.
Merlin, Rép. de Jurisprudence, *voc.* Étranger, Domicil.

JUDICIAL DECISIONS.

Lynch's case, *Sirey's Reports* (1851).
Thornton v. *Curling*, *Dalloz Reports* (1827).
Baron de Mecklembourg's case { *Gazette des Tribunaux* (1856). *Le Droit* (1856).
D'Abaunza's case, *Sirey* (1842).
Princess Poniatowska v. *Le Normand* (1811), *Dalloz, Recueil Alphabétique*, tome iii. p. 348.
André v. *André* (1844), *Recueil Périodique de Dalloz*, 2 (1851).
Verity v. *Mackenzie*, *Dalloz Rep.* (1847).
Breul's case, *Gazette des Trib.* (1852).
———— *Appeal*, *ib.* (1853).
Lloyd v. *Lloyd*, *Sirey* (1849).
Onslow v. *Onslow*, *Dalloz* (1836).
De Veine v. *Routledge*, *Sirey* (1852).

Browning v. *De Narye or Veyne*, *Dalloz* (1853).
Olivarez' case, *Le Droit* (October 11, 1854).
Laneuville and Anderson's case, *Gaz. des Trib.* (1855).
Church v. *Cargill*, *Dalloz Rec. Alphabét.* tome vi. p. 474 (1811).
Houséal v. *Colon*, *Dalloz Rec. Périod.* ii. p. 137 (1838).
Appleyard v. *Bachelor*, *ib.* ii. p. 170 (1847).
The Husband C. or Czarnecki's case, *ib.* ii. p. 149 (1848).
Same case on Appeal, *Court of Cassation*, *ib.* i. p. 256 (1849).
Collett's case, *Gaz. des Trib.* (1855).
Fraix' case, *Le Droit* (1856).
Scottowe's case, *Gaz. des Trib.* (1856).

Upon these cases the following notes were prepared on behalf of the party supporting the will:—

LYNCH *v.* LYNCH.—This was the only case decided by the French Courts, in which, when the advocates in the case of *Bremer* v. *Freeman and Bremer* were examined, the question of the law regulating the succession of a foreigner who had died in France had been brought forward distinctly. The decree in that case was made by the Imperial Court of Paris on the 13th of March, 1850, relating to the succession of Francis Lynch, and the Court refused to entertain the settlement of the succession of the deceased, on the ground that he had not been naturalized a Frenchman; that he had not even obtained from the king the right to establish his domicil in France; and the Court declared that consequently he died an Englishman, and that his fortune being wholly personalty must be governed by the Law of England; he leaving no French heirs.

THORNTON *v.* CURLING.—The converse of the decision in *Francis Lynch's* case had been decided by the Court of Cassation (the highest Court of Appeal) in the case of *Thornton* v. *Curling* in 1826. The Court held that the succession of Thornton, an Englishman, and the validity of his will were subject to the Law of France, on the ground that he had obtained the authorization of the Government to establish his domicil there.

BARON F. DE MECKLEMBOURG'S CASE.—After the hearing of the cause of *Bremer* v. *Freeman and Bremer*, but before the decree was pronounced, the case of the *Baron Frederick de Mecklembourg*, a German, which is mentioned in the Judgment, was decided by the French Courts. In that case the Tribunal of the Seine found that it resulted, from all the facts and documents produced, that he had his principal and indeed sole establishment in Paris; and held that he had died domiciled at Paris, and that his succession opened there, though he had not been authorized to establish his domicil in France.

The decision was appealed from, to the Cour Impériale de Paris, on the ground that the deceased had not been naturalized a Frenchman,

nor had obtained the authorization of the Government to establish his domicil in France under the 13th Article of the Code, and the Court *reversed the decision.*

CARLIER D'ABAUNZA'S CASE.—Under a Law of the 17th of April, 1832, Art. 14 (see M. *Coin de Lisle's Exhibit* 6, *Joint Appendix*, p. 155), a foreigner not domiciled in France is liable to arrest for debt. M. Carlier d'Abaunza was arrested by his creditor under that law, and the Civil Tribunal of the Seine refused to set aside his arrest, and held that the prolonged residence of a foreigner, and even his marriage in France, could not enable him to obtain the rights resulting from the establishment of the Domicil, which can only take place in the terms provided by the Article 13 of the *Civil Code*, *i.e.* with royal authorization. On appeal, the Imperial Court of Paris confirmed the decision, holding that the Appellant had not proved that he was domiciled in France.

THE PRINCESS PONIATOWSKA'S CASE.—In this case, which was one of arrest, the arrest was upheld by the Imperial Court of Paris, by decree of the 16th of August, 1811, on the ground that the Princess was a foreigner, and did not prove a domicil in France, established conformably to the Article 13 of the *Civil Code.*

ANDRÉ *v.* ANDRÉ.—In this case, in which the Court of Douai, by decree of the 12th of July, 1844, held that the French tribunals were not competent to take cognizance of purely civil obligations contracted between foreigners when the defendant declines their jurisdiction, the Court observed as follows: "Whereas a residence more or less prolonged in France cannot constitute a Legal Domicil, since, according to the terms of the Article 13 of the *Civil Code*, a foreigner cannot acquire such a domicil in France, unless in virtue of an Ordinance of the King."

VERITY *v.* MACKENZIE.—This was a decree of the Court of Cassation, by which, notwithstanding the deceased (whose succession was in question) had resided for forty years in France, the Court would not allow itself to be competent to adjudicate, by reason of the interests on all sides being of foreigners only. (See the *Evidence of M. Blanchet, Joint Appendix of Case before Privy Council*, p. 139.)

BREUL'S CASE.—Breul was a Hanoverian. He resided for more than thirty years in Paris, and married there a Frenchwoman in 1847. He died at Paris in 1851, having made his will, in which he asked himself whether, by the fact of his having married without a settlement, there was a community of goods between him and his wife conformably to the French Law. He disposed of his property in either alternative. On the question being brought before the Civil Tribunal of the Seine, the heirs of the deceased objected to the competency of the Tribunal. The Tribunal held that the 13th Article of the *Civil*

Code had not for its object to determine the conditions which a foreigner must fulfil in order to acquire a domicil in France; and on the ground of the *de facto* domicil, and of the * interests of two Frenchwomen being involved, the Court overruled the objection of incompetency, and retained the cause for decision.

In the Appeal to the Imperial Court of Paris, the question was, whether there was community of goods between the husband and wife under the Articles 1393 and 1400 of the *Code*.

The Court held that Breul being a foreigner did not prevent the application of those Articles; that foreigners, capable of stipulating in all contracts, *tenant du droit des gens*, as that in question, may, in marrying in France, accept tacitly the rule of community; that undoubtedly the *de facto* domicil ought to have an importance distinguishing it from a simple residence, but that it was not necessary that it should have been authorized by the Government in the terms of the Article 13 of the *Code*, since the object of that authorization is to confer on the foreigner all the civil rights belonging to natives; and those rights are not necessary for the regulation of matrimonial conventions, which are purely of the *droit des gens*.

The Court of Appeal thus adopted the distinction between civil rights (which would include the right of making a will, declared by Article 25 † of the *Code Napoléon* to be a civil right) and matrimonial contracts, purely of the *jus gentium*.

Lloyd's Case.—This is also one of tacit convention for community of goods between husband and wife.

The Imperial Court of Paris held that a domicil, as established under Article 13 of the *Code*, is not required for the purpose of matrimonial agreements, which belong purely to the *jus gentium*. And as to the legitimation by Lloyd of his natural children, the Court, in admitting an unauthorized domicil as a ground for presuming the intention of the parties to have been to submit to the French Law of community of goods, does not mean that such a domicil can give him the French personal status. Accordingly it validates the legitimation of the natural children, notwithstanding the English Law, which the Court considers was still the status of Lloyd, but on the ground that he had entered into an engagement with the mother to do so, and that this woman, being a Frenchwoman, was authorized by her status to legitimize her children, and that the latter cannot be legitimate as regards the mother, and illegitimate as regards the father.

The Court orders the distribution of the succession among the children. Its reasons for so doing are omitted in the Report; but as

* By Article 14 of the *Civil Code* Frenchmen are enabled to cite before the French Courts foreigners, even those not in France; and it is holden on this Article, that the French heir or creditor of a foreign succession can bring before the French Courts the questions that interest him.

[† This Article has since been superseded by the Law of May 31, 1854.]

the Court declares that there was a tacit agreement that the French Law and all its effects should be carried out with respect to the legitimation of the children and its effects under the French Law, it considers it to have been agreed that they should have the rights which the French Law reserves to children in the succession of their parent, and not be thrown back on the English Law and treated as bastards, and thus lose the object of the legitimation.

ONSLOW'S CASE.—Onslow was an Englishman by birth, who had become naturalized in France within the terms of a Law of the 30th of April, 1790. The question was, whether he had acquired a legal domicil in France, notwithstanding subsequent laws requiring other conditions. The Court of Riom held that he was naturalized; that moreover he had acquired a domicil in France before the *Code*, of which he could not be deprived by any conditions under the *Code*. It then expresses an opinion, not called for by the case, that even under the *Code* a domicil can be acquired without any authorization; and "on these grounds" the Court gave judgment.

The Court of Cassation on Appeal held that Onslow had been naturalized a Frenchman under the Law of 1790, and that the Court of Riom had made a just application of that law—the violation of which was the sole ground of appeal.

In this case Onslow had married a Frenchwoman in 1783, and had resided continuously in France up to his death in 1829. All his property was in France, and all his children, *i.e.* all the parties in the cause, were French.

ROUTLEDGE *v.* DE VEINE OR CONNOLLY'S CASE.—A holograph will, made by Connolly, an Englishman settled in France, of his real and personal property in that country, in favour of his adulterine children, was set aside by the Court of Paris at the suit of Madame de Veine, *an illegitimate daughter*, who had become French by her marriage with a Frenchman, on the ground that it did not in all respects comply with the provisions of the French Code.

The Court finds that the succession being both real and personal, Madame de Veine had on that ground an interest in disputing the will—that the succession had been opened in France, Connolly having resided there upwards of twenty years, and having placed there his fortune and his establishment; but these facts are given as a ground of the succession, which was real as well as personal, opening in France, *i.e.* for giving competence to the French Courts, not for its being governed by the French Law. The reason given by the Court for subjecting the personal property to the French Law is, that the personal property being in France, and Madame de Veine being French, it would be a violation of the principle of national sovereignty, and of the protection due by the Law to natives, if in such a state of things the property, personal as well as real, was not governed by the French Law.

The Court declares, moreover, that this lady is entitled, as a Frenchwoman, to the benefit of Art. 2 of the Law of 1819.

Under the *Civil Code*, and until that Law, a foreigner could only inherit in France in case the French were admitted by treaty to the same right in his country.

The Law of 1819 did away with that restriction. By Art. 1, foreigners are to inherit in the same manner as the French; and by Art. 2, in case of the heirs of a succession being both Frenchmen and foreigners, the former may take out of the property in France the value of the share from which they are excluded in the property in foreign countries on any ground whatever by virtue of the Local Law.

This Law is construed to give a French person the right of requiring the application of the French Law to the succession, even personal, of any foreigner, whether domiciled or not in France. Hence the illegitimate daughter of Connolly, having become French by her marriage, was entitled to have her father's succession treated as a French succession. The will was set aside as not being in the form required by the Law of France, where it was made, and the succession was held to be governed by the French Law.

On an Appeal to the Court of Cassation, the Court declared (see p. 57 of reported cases) that if all that relates to the status of the Testator, to the extent and limit of his rights and his capacity, is regulated by the personal statute which follows the person, it is otherwise in respect of the solemnity of the document, and of the exterior form, which are regulated by the Law of the country where the Testator disposes; and that thus the holograph will made by a foreigner in France, and of which execution is demanded before the French Tribunals, can only be declared valid, provided it unites all the conditions of form required by French Legislation.

The Court dismissed the appeal, on the ground of no law having been violated by the Court of Paris in pronouncing for the nullity of the will, as not made in the holograph form determined by the French Law.

Olivarez' Case.—His personal estate in France was held subject to the French law, and the Court of Bordeaux expressed an opinion that a foreigner can acquire a Domicil of Succession without authorization.

Olivarez, a Dane, came to France whilst yet a minor, with his mother, who was his guardian, his father being dead: his mother married a Frenchman and became French. This gave the minor a complete French domicil, the minor having the same domicil as his guardian. He died in France soon after his majority.

Two of his heirs were French, his mother and sister both French by their marriages.

Madame Gomez, the sister of the deceased, as French, was entitled to the application of the French Law under the Law of 1819, and the

presence of French interests rendered it impossible to follow the usual rules of Domicil, as will appear from the case of succession of the sister of Olivarez, Madame de Vivanco, decided by the same Court the same day.

This lady had married a Spaniard established at Bilbao, and died a minor, having by will left her property to her mother ; the Spanish Law, which the Court says was her personal statute, and the treaties between Spain and France, permitting her to make such a will. Madame de Vivanco only left in France some personal property, her share in her brother's estate. The Court found that she was domiciled at Bilbao, and referred the settlement of her succession to the Courts of that place.*

LANEUVILLE *v.* ANDERSON.—Madame Laneuville, a Frenchwoman, a legatee under the holograph will of Mr. Wm. Anderson, an Englishman, cited the Testator's nephew before the Tribunal of Paris, in order to obtain an order for putting her in possession of the goods and valuables of the Testator situate in England and Ireland. She also made M. Guichard, a legatee under a subsequent will, and who had taken up his residence at Dublin, a party to the proceeding.

The nephew, M. Guichard, objected to the competency of the Court ; but the Court overruled the objection, and the Court of Paris, on Appeal, upheld the decision. The Court, in giving its reasons, observed that the Art. 14 of the *Code Napoléon* is a direct consequence of the principle of Sovereignty ; that the Art. 59 of the *Code of Civil Procedure*, applicable exclusively to successions opened in France, and regulated by French Law, does not derogate from the rule laid down for protecting the Frenchman in his claims against the foreigner.

CHURCH *v.* CARGILL.—The defendant, an Englishman, resident in France, being cited before the French Court, objected to its competency as not being the Court of his domicil. The Court of Cassation held the citation valid, distinguishing between a domicil conferring political or civil rights, which can only be obtained by conforming to Article 13, and the *de facto* domicil of every foreigner who is residing in France. which is sufficient for a citation.

Here the Court of Cassation allows that a domicil *de fait*, which it assimilates to a mere residence, is enough for giving jurisdiction to the Courts. The reason being the Article 59 *C. Procéd. Civil*, cited by Coin de Lisle :—" In personal matters the defendant shall be summoned to appear before the Tribunal of his domicil, and if he has no domicil, then before that of *his residence*."

HOUSÉAL *v.* COLON.—This was a case of arrest. The Imperial Court of Paris, in giving judgment, says, " Considering that by Article 14 of the Law of 1832, foreigners not domiciled in France are subjected to arrest for debt, and that a foreigner can only be considered as

[* This case was reversed on appeal.—*Vide post*, p. 238.]

having a Legal Domicil on proving that he has the authorization of the Government for establishing that domicil."

APPLEYARD *v.* BACHELOR.—In this case the Court of Rennes treated the domicil of a foreigner in France as a civil right to which he can only be admitted in conformity with Article 13.

CZARNECKI'S CASE.—Czarnecki was a Polish refugee, banished for life from his own country, in which his condition was that of a person civilly dead. He had established himself as a printer at Saintes, in France, and married a person of that place. His wife applied to the Tribunal of Saintes for the separation. The Tribunal pronounced the separation. On Appeal by the husband, the Imperial Court of Poitiers reversed the judgment—considering (says the Court) that the wife of Czarnecki does not show that her husband has been authorized to establish his domicil in France—that the Frenchwoman who marries a foreigner follows the condition of her husband and becomes a foreigner.

In support of the appeal to the Supreme Court from this decision, it was said that, Czarnecki being civilly dead in Poland, the Courts of that country would not recognize, as having any effect in Poland, the engagement he entered into elsewhere, that he had thus no country, and that his only judges were those of Saintes.

The Court of Cassation dismissed the Appeal. It held that the Article 59 *C. Procéd.* relative to citations does not alter the incompetency of the French Courts with respect to proceedings affecting the status of persons.

COLLETT'S CASE.—The Court of Cassation decided that the French Tribunals are competent to make a decree on application for a separation of a husband and wife, foreigners, legally authorized to establish their domicil in France.

FRAIX' CASE.—The language of the Imperial Court of Paris can leave no doubt of its opinion that no establishment in France, however long, can constitute a domicil. Fraix was a Savoyard, who had been settled for forty years in Paris, earning his living as a Commissionnaire, when he married his second French wife, without making a settlement. The question was, if he must be held to have married under the French community of goods? The Court found that when he married he had established himself in France, and had altogether abandoned his native country. It held that he was married under the law of French community. It was true the Court declared that Fraix had not been authorized to establish his Domicil in France, but a domicil was not necessary to make the *communauté* applicable, which is presumed to have been the intention of the parties when they fixed themselves in France.

SCOTTOWE'S CASE.—An Englishman, described as a rich proprietor in the Department of the Loiret, where he had long been settled, and

whose first and second wives were both French, legitimated, on his second marriage, the natural children he had by his second wife, and then sought, by virtue of Art. 960 of the *Code*, which revokes donations in favour of strangers in case of children subsequently, to set aside an annuity he had settled on another person. The validity of the legitimation was disputed on the ground of the English Law not admitting it. On the other hand, proof was given that in England the status of a person is determined, not by the law of his country, but by that of his *de facto* domicil. The *de facto* French domicil was not denied ; but Article 13, and the fact of Scottowe being an Englishman, were relied on against the validity of the legitimation. The Court of Orleans, confirming the decision of an inferior Court, held that the legitimation was void as contrary to the English Law.

OLIVAREZ' CASE.—This is a very recent decree of the Court of Cassation on Appeal from the Imperial Court of Bordeaux. The Court of Bordeaux had decided that at the time of her decease Madame De Vivanco was not domiciled at Bordeaux, but at Bilbao ;—that by the terms of the Article 110 of the *Code Napoléon*, the place where the succession opens is determined by the domicil ; that thus the succession of Madame De Vivanco was opened in Spain ; that her succession was personal only, and remained subject to the Law of the Domicil ; and that the Article 2 of the Law of the 14th of July, 1819, was not applicable.

The Court of Cassation reversed the decision, and the Court states in its decree, that neither the rule laid down in the Art. 110 of the *Code Napoléon*, in virtue of which the opening of a succession is determined by the domicil, nor the rule which provides, conformably to the Art. 3 of the same *Code*, that the status and the capacity of persons shall be regulated by the national law forming their personal statute, ought, in any case, to be an obstacle to the execution of the Law of the 14th of July, 1819 ; and that the French Tribunals, and not the foreign Tribunals, are competent to maintain in virtue of that Law, in respect to goods situate in France, the right reserved by the French Laws to French coheirs.

This case shows how the established rules of the French Courts are set aside by them in favour of French persons under the Law of 1819.

The following cases were cited by the party opposing the will in addition to those cited on the other side :—

QUARTIN.—*Court of Cassation.*—This decision upheld the holograph will of a foreigner made in France, and here again the Court of Cassation held that the Court appealed from had not, in applying the rule of *locus regit actum*, violated any law. The Court says (see p. 25 of Appellant's case) that *the form of a will is governed by the law of the*

country where the Testator disposes; for otherwise the foreigner would, when out of his own country, be prevented from making his will, in consequence of the impossibility of having recourse to the forms required by the Law of his Domicil; the laws determining the forms in which a will is to be made do not affect the capacity of the Testator, but only the external solemnities which are to accompany the expression of his wishes.

The property in that case in France was personalty (see p. 22 of Appellant's case), and nothing is said as to any property elsewhere. The Civil Tribunal of the Seine (whose decree was upheld by the Royal Court of Paris) says in its decree (see p. 23), *Whereas the property composing the succession of Quartin existing in France is purely personal, and personalty in principle follows the condition and capacity of the person*; and the Court recognized and applied to the will the personal statute of the Testator. It is thus clear that if he had died intestate, the Court would have applied his personal law to his succession: and it is by no means to be inferred from the Court of Cassation rejecting the Appeal, on the ground that the Court of Paris had not violated any law by upholding the holograph will, that the Court would have set aside an Englishman's will made in the forms prescribed by his personal law disposing of personalty following his capacity, and not situate in France.

D'Hervas.—*Court of Cassation.*—A Frenchwoman, in 1812, married a Spaniard at Madrid, and thereby became a foreigner. Soon afterwards the parties came to and established themselves in France, and acquired real estate there.

In 1820 the wife acknowledged herself indebted jointly with her husband to M. Bonnar, and as security she mortgaged the estate belonging to her.

The wife pleaded nullity of the obligation, on the ground that it was not valid by the Spanish Law.

The Court of Paris held that, there being clear evidence of a Domicil *de facto* in France, the contract was to be judged according to the French Laws.

The Court of Cassation said in its decree that the question in that case did not relate to the status of Madame D'Hervas (the wife), but to the validity of a contract entered into in France by a foreigner who had a domicil there, and was the owner of realty there.

In the next *attendu* the Court says that if the 3rd Article (of the *Code*) declares that the laws concerning the status and the capacity of persons govern Frenchmen, even when resident in a foreign country, it does not contain any similar or analcgous disposition in favour of foreigners resident in France, whence it results that the decree attacked cannot have violated that Article.

Unless a very qualified meaning is to be attached to that *attendu* of the Court, it is overruled by the later decisions of the same Court in the cases of Connolly and Quartin, in which the doctrine is clearly

recognized that whatever relates to the status of the foreigner, and to the extent and limitation of his rights and of his capacity, is governed by the personal statute, which follows the person wherever he goes.

In the next *attendu* the Court says that realty possessed by foreigners in France is, according to the terms of the same Article, governed by the French Laws.

There was, therefore, in that case, a *de facto* Domicil, sufficient for the regulation of contracts of the *jus gentium*, and, moreover, the contract related to realty in France, as to which the 3rd Article of the *Code* says, "Realty, even that possessed by foreigners, is governed by the French Law."

DUBOIS DE CHEMANT.—*Court of Paris.*—This case was decided in 1836. The Testator, a Frenchman by origin, died at London a naturalized Englishman.

A decree of 26th of August, 1811, deprived the Frenchman, naturalized in a foreign country without the authorization of the French Government, of the enjoyment of his civil rights and of the ownership of his property; and the Court decided in this case, that that decree had been abrogated by the Law of the 14th July, 1819, which abolished the *droit d'aubaine*, and granted to the foreigner the power of disposing and of receiving in France.

The Court of Cassation decided that thus the Testator, who had become a foreigner by his naturalization in England, had had since the Law of 1819 the capacity of disposing of his property situate in France. And the Court further decided that his succession was to be governed by the Law of England, which had become the Law of his Domicil.

DE BONNEVAL.—*Court of Cassation.*—This case was decided in 1843. The Court of Cassation rejected an Appeal from the Royal Court of Rouen, which had decided that the will of a Frenchman made in England, in compliance with the forms prescribed by the English Law, was a valid will within the terms of the 999th Article of the *Civil Code*, which enables a Frenchman in a foreign country either to make his will in the holograph form, or by authentic act, with the forms used in the place where that document is drawn up.

Here follow the letters of the President and opinion of the French Advocates referred to at p. 225.

No. 70. Paris, le 16 Juin 1857.
Tribunal de 1re Instance du Département de la Seine.
Cabinet de M. le Président.

Monsieur,—Par votre lettre datée du 15 Juin, 1857, vous me demandez de vous indiquer plusieurs des avocats les plus anciens et les plus éminents du barreau de Paris, à l'effet de vous donner une con-

sultation sur des difficultés élevées à l'occasion de l'ouverture en France d'une succession Anglaise. Je ne vois aucun inconvénient à répondre officieusement à votre demande : en conséquence voici les noms des avocats dont la connaissance et la capacité peuvent vous inspirer une entière confiance.

MM. de Vatimesnil, Demangeat, Chaix d'Est Ange, Berryer, Dupin, Paillard de Villeneuve, Bethmont, Odilon Barrot, Marie et Lionville.

Veuillez recevoir, Monsieur, l'assurance de mes sentiments les plus distingués.

Le Président du Tribunal civil de la Seine.

Monsieur Digweed, Avocat Anglais, Rue du Colisée, 3, Paris. BENOITCHAMPY.

Devant le "Judicial Committee" du très Honorable Conseil Privé de Sa Majesté.

BREMER *v.* FREEMAN et BREMER.

Dans les biens meubles de Fanny Calcraft, célibataire, décédée.

ONT comparu personnellement Antoine François Henri de Vatimesnil, Avocat à la Cour Impériale de Paris, Ancien Avocat-Général à la Cour de Cassation, Ancien Ministre de l'Instruction Publique, demeurant à Paris, Rue St. Dominique, St. Germain ; Charles Demangeat, Docteur en Droit, Avocat, Professeur à l'Ecole de Droit de Paris, demeurant Rue d'Enfer, No. 11, à Paris ; Eugène Bethmont, Ancien Ministre de Justice, Ancien Président du Conseil d'Etat, Ancien Bâtonnier de l'Ordre des Avocats, demeurant à Paris, Rue des Capucines, No. 3 ; Pierre Antoine Berryer, Ancien Bâtonnier de l'Ordre des Avocats, demeurant à Paris, Rue Neuve des Petits-Champs, No. 64 ; Felix Silvestre Jean Baptiste Lionville, Bâtonnier de l'Ordre des Avocats, demeurant à Paris, Rue des Moulins, No. 19 ; Camille Hyacinthe Odilon Barrot, Avocat à la Cour Impériale de Paris, Ancien Garde des Sceaux, Ancien Président du Conseil des Ministres, demeurant à Paris, Rue de la Ferme des Mathurins, No. 24 ; Alexandre Thomas Marie, Avocat à la Cour Impériale de Paris, Ancien Bâtonnier, Ancien Ministre, demeurant à Paris, Rue Neuve des Petits-Champs, No. 64 ; André Marie Jean Jacques Dupin, Avocat à la Cour Impériale de Paris, Ancien Procureur Général à la Cour de Cassation, Ancien Président de la Chambre des Députés, demeurant á Paris, Rue du Bac, No. 118 ; Adolphe Victor Paillard de Villeneuve, Avocat à la Cour Impériale de Paris, Membre du Conseil de l'Ordre des Avocats, demeurant à Paris, Rue Louvois, No. 4 ; et Gustave Adolphe Chaix d'Est

Ange, Avocat à la Cour Impériale de Paris, Avocat de la Maison de l'Empereur, Ancien Député, demeurant à Paris, Rue St. George, No. 15 ; et ont séparément fait serment, Qu'étant informés que Fanny Calcraft, la défunte, était née à Calcutta aux Indes Orientales, en l'année 1795, et qu'elle était l'enfant légitime de parens Anglais, Qu'elle a commencé à résider *animo manendi* à Paris en l'année 1838, et qu'elle a fait son testament dans cette ville en 1842, conformément à la loi Anglaise, Qu'elle est morte à Paris en 1853, Qu'elle n'était pas naturalisée en France, Qu'elle n'avait pas obtenu du gouvernement Français l'autorisation d'établir son domicile en France aux termes de l'article 13 du Code Civil de ce pays, Ils sont positivement d'avis que d'après la loi Française la défunte n'a jamais acquis en France un domicile de nature à faire régir par la loi de ce pays son testament ou la forme de son testament, Que conséquemment si ce testament est fait en conformité avec la loi Anglaise, la défunte ne serait pas jugée être morte intestat.

BERRYER,
Ancien Bâtonnier.
CH. DEMANGEAT.
MARIE,
Ancien Bâtonnier.
L. DE VATIMESNIL.
DUPIN,
Ancien Bâtonnier.
BETHMONT,
Ancien Bâtonnier de l'Ordre des Avocats de Paris, &c.
FELIX LIONVILLE,
Bâtonnier.
ODILON BARROT.
PAILLARD DE VILLENEUVE.
G. CHAIX D'EST ANGE.

CHAPTER XV.

JUS PERSONARUM—STATUS.

CCCLII. We have now considered the nature of Origin and Domicil, two personal ties which bind the individual to a particular territorial jurisdiction.

This consideration, however, has not carried us far on the way to the goal which is the end of our enquiry—viz. What positive law ought to govern the jural relations of a foreigner? Even if this law were, which it is not, necessarily identical with the jurisdiction of the *forum*, there are other causes or sources of that jurisdiction besides Origin and Domicil.

When Donellus is speaking, in his admirable Commentaries, on "Ubi subjiciatur quisque ex personâ suâ jurisdic-"tioni," he says, "Jure communi omnino *quatuor res* sunt, "quæ eos qui *ex personâ suâ* conveniuntur, jurisdictioni "ejus apud quem agitur subjiciunt: quæ eædem faciunt, "ut judicis jurisdictio sit de eâ re de quâ agitur; sive ut "sit competens judex quem quærimus: apud quem pro-"pterea quisque agere et conveniri debeat. Sunt autem "hæ res totidem subeundæ jurisdictionis causæ:—

"1. *Domicilium* litigatoris in territorio judicis constitutum.

"2. *Obligatio*, quâ de agitur, ibi contracta.

"3. *Res* ita sita de cujus *proprietate* aut *possessione* "agitur.

"4. *Judicium* ibi apud eum judicem cœptum" (*a*).

CCCLIII. With reference however to this citation from

(*a*) *De Jure Civ.* lib. xvii. c. xii. 1.

Under this last head is established the position, that a person who has instituted a suit cannot afterwards decline the *forum*.

Donellus, and to this mode of ascertaining what is the Law, by enquiring what is the *forum*, it must be observed that though in the Roman Law and in the Law of Christendom there exists, generally speaking, an intimate connection between the jurisdiction, or *forum*, to which a jural relation is subject, and the Law which ought to govern that relation, nevertheless, it cannot be said that the two are necessarily identified: there are cases clearly arising, for instance, out of *obligations*, in which the choice of a particular local law may be an integral part of the engagement, and in which the *forum* may be wholly different (*b*).

CCCLIV. But, though by an investigation into these other sources of jurisdiction, namely, the *obligatio* and the *res sita*, we might be led to a full though circuitous consideration of the law which ought to govern all the legal relations of the foreigner, we shall more naturally and readily arrive at the same end by a somewhat different road. In the foregoing chapters we have considered the individual as merely existing in a certain place; and so, to speak in the abstract, we must now proceed to consider him as a jural person, both passively the subject of jural relations, and actively capable of acquiring them.

We advance, therefore, to the next step in our enquiry, by considering what is the *jus*, or what are the jural relations of which the person is the centre, and round whom they are grouped.

The same great civilian, speaking "De jure privato," says, "dicitur, jus omne quo utimur, vel ad *personas* per-"tinere, vel ad *res*, vel ad *actiones*. Quod enim *nostrum* "est consistit in *personâ* cujusque et *rebus* extra personam "positis: obtinendi autem ejus ratio est in *actionibus* (*c*), "id est in judiciis quibus nostrum consequimur. Nam *ac-*"*tionum* verbo hoc genus persecutionum intelligi, non autem "hominum *actus*, ut Connanus interpretari tentat," ... (*d*)

(*b*) *Savigny, R. R.* viii. ss. 356, 359, 360.
(*c*) *Actus*, distinct from *actiones*. *Vide infrà*.
(*d*) *Donellus, De Jure Civ.* lib. ii. c. vii. 4.

"Id quod nostrûm cujusque est, duplex est. Est enim "quod verè et propriè nostrum sit: est etiam quod nobis de- "beatur. . . . Ita jus nostrûm cujusque, seu quod nostrum "est, duabus his rebus continetur, eo quod propriè nostrum "est, et obligatione nobis rectè quæsitâ." (*e*)

He proceeds to enquire what the ingredients are which make up what we call *our own*—"quod propriè nostrum "est"—and he discovers that they are Rights (1) attaching to our Persons and (2) to the Things external to them. As to the former, he says, "In personâ cujusque id nostrum "est quod tribuitur personæ, id est, quod cuique ita tribuitur "ut is id habeat in sese, etiamsi desint res cæteræ externæ. "Hæc a naturâ cuique tributa sunt quatuor: vita, incolu- "mitas corporis, libertas, existimatio." (*f*)

But these Personal Rights may suffer diminution, and the mode of their existence constitutes the *status* of each individual:—"*Status*" (he defines) "est *conditio personæ* "cujusque—jus, facultas vivendi et faciendi quæ velis, quæ "ei conditioni tribuitur." You enquire into the *status* in order to ascertain the *jus personæ*: the one is cause, the other effect:—"status et conditio causa est: jus personæ "illius statûs et conditionis effectus" (*g*).

CCCLV. Under the term *Status* (*état; Stellung*) are properly included, in this treatise, all questions relating to the personal condition of the individual (*h*), *e.g.* whether

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(*e*) *Donellus, De Jure Civ.* lib. ii. c. viii. 1.

(*f*) *Ibid.* c. viii. 2, 3.

(*g*) *Ibid.* c. ix. 2. The title in the Pandects "*De Statu*" is identical with the title in the Institutes "*De Jure Personarum.*"

(*h*) *Savigny, R. R.* i. s. 59, condemns a modern improper use of this expression as denoting a particular personal capacity or condition, which is not the sense of the word in the Roman Law. It especially applies to the individual in all the relations of family, and is, he thinks, identical with *jus personarum.* ["*Status* und *conditio hominum* hat nämlich nicht die ganz unbestimmte Bedeutung eines Zustandes oder einer Eigenschaft überhaupt, sondern es bezeichnet ganz besonders die Stellung, die der einzelne Mensch in den verschiedenen Familien- verhältnissen, als Ehegatte, Vater, Vormund u. s. w., einnimmt.

he be a slave or a free man; all questions relating to legitimacy, minority, capacity of entering into any contract, whether of marriage, the contract of contracts (*seminarium Reipublicæ*), or into others of an inferior order,—all these questions carrying with them others emergent from and incident to them.

But before we consider the operation and efficacy allowed by the Comity of States to laws affecting the *status* of foreigners, it will be expedient to make some mention of the *Statutes* or the *Statuta* which occupy so prominent a position in the writings of continental jurists, both of ancient and modern times.

Auch *jus personarum* hat, wie ich glaube, völlig dieselbe Bedeutung, da es mit jenen Ausdrücken abwechslend gebraucht wird. Es bezeichnet also nicht einen Theil der Rechtstheorie, wie *jus publicum* und *privatum*, sondern vielmehr die Stellung des Einzelnen in den zur Familie gehörenden Rechtsverhältnissen; oder, nach dem Sprachgebrauch mancher Neueren, es bezieht sich nicht auf das objective, sondern auf das subjective Recht."—*Savigny, ubi sup.* p. 400, ed. 1840, Berlin.]

Rocco, c. xix. p. 409, &c., is not very satisfactory or precise on this head.

CHAPTER XVI.

STATUTES.

CCCLVI. The endeavours of jurists to find a satisfactory solution of the great problem of Private International Jurisprudence,—viz.: Ought any, and, if any, what, laws to be allowed an efficiency and operation beyond the territory of the lawgiver?—led eventually to the famous category of (1) *Personal*, (2) *Real*, (3) *Mixed Statutes*. Any work on the *Jus Gentium* which omitted all notice of this ancient and celebrated division, would be censurable on the double ground of historical imperfection, and of omitting to explain to its readers the meaning of technical terms, without a knowledge of which the writings of jurists would be, for the most part, unintelligible. It is true, nevertheless, that the examination will not lead to the satisfactory result of ascertaining firm and clear landmarks in this branch of the science of law; for it must be admitted, First, that the division itself has always encountered much opposition; Secondly, that it is built upon an ambiguous and unsteady principle; Thirdly, that in the application even of this principle, jurists have proceeded in an arbitrary and uncertain manner; and, Lastly, that they have been far from unanimous upon some of the most important questions arising out of the division. Still, some notice of this division is a necessary part of the task undertaken by the writer of these pages; though it need not enumerate or classify every variety of opinion which the subject has called forth.

CCCLVII. From the time of the writers (*postglossatores*) who succeeded to the earliest commentators on the

Civil and Canon Law (*glossatores*), the doctrine conveyed in the axioms, "statutum territorium non egreditur,"—"statutum non porrigitur vel se non extendit extra terri-"torium statuentis,"—"efficacia statuti ad territorium "statuentis restricta est," has univerally prevailed in the civilized world. The doctrine originated in Italy—the cradle of Law—which also, after it became divided into separate principalities, furnished the name "*Statutum*," and the first commentators upon it. The German commentators of the sixteenth century built upon the Italian foundation, which was, in fact, the principle of exclusive territorial sovereignty, expressed in the axioms which have just been cited. The *Statutum* was the positive law —the *Jus Civile* of that exclusive territorial sovereignty.

CCCLVIII. The great Italian jurist, Bartolus, may be said to have planted, about the middle of the fourteenth century, that threefold division of the *Statutum*, which, towards the end of the sixteenth century, had ripened into the scientific form which it has ever since worn.

Bartolus wrote, among others, a commentary on the words "cunctos populos," which are the first two words of the First Title of the First Book of the Roman Code (*a*).

CCCLIX. He propounds for consideration two questions (*b*), not stated with great accuracy, or very carefully distinguished from each other.

1. *An Statutum porrigatur extra territorium ad non subditos?*

(*a*) *Cod.* lib. i. t. i. "De Summâ Trinitate et fide Catholicâ, et ut nemo de eâ publicè contendere audeat." "*Cunctos populos* quos clementiæ nostræ regit imperium in tali volumus religione versari quam divum Petrum Apostolum tradidisse Romanis religio usque adhuc ab ipso insinuata declarat."

(*b*) I have given the heading of this remarkable commentary, with all its subdivisions, in the note to this chapter. I have added the *ipsissima verba* of that part of the text which is most pertinent to the subject of this work; but for the analysis which follows here I am chiefly indebted to *Wächter, Archiv*, vol. xxiv. p. 272, note 79.

2. *An effectus Statuti porrigatur extra territorium statuentium?*

He founds his reply to these questions upon citations from the Roman Law, which do not, when carefully examined, always support his positions.

CCCLX. First, as to a *Statutum* affecting *Contracts* —(*a*) as to their *Form*—the *Statutum* of the place of the contract is to be applied: even when the contract is made abroad, and the action upon it brought at home. (*β*) A like rule is applied to the *effects* which belong to the nature of the contract. An exception, however, is made in the case of contracts relating to Marriage and Dowry: in these the law of the husband's domicil is applied. (*γ*) But as to matters *quæ oriuntur ex post facto propter negligentiam vel moram*, (in which *prescription* is included) if a definite place of payment (*locus solutionis*) be specified, the law of that place prevails; otherwise, the law of the place where the action is brought.

Secondly, as to the *Statutum* affecting *Testaments*. Bartolus enquires whether a stranger can legally make his Will according to the *forms* of the State in which he is; and the answer is in the affirmative, unless the law of that State have reserved these forms as the special privilege of its own citizens. A testament so validly executed is valid everywhere, and operates upon property in other States.

Thirdly, as to the *Statutum* affecting the *capacity* to make a Will. The laws of the State are not to govern foreigners who happen to make their Wills there, "*quia* "statuta non possunt legitimare *personam* non subditam, "nec circa ipsam personam aliquid disponere." But it is not so with respect to the *solennitas actûs*—that belongs to the jurisdiction in whose *territorium* it has been adopted.

Fourthly, if the right to a particular thing be in question, then *statutum loci ubi res est* must be applied. Nevertheless, Bartolus arbitrarily modifies this position when he considers the second question, *An statuta porrigant*

effectum suum extra territorium? for on this he lays down the following positions:—

(A) A *Statutum which prohibits an individual from doing certain things* follows him into a foreign State when it is *favorabile, i.e.* made for the advantage of the individual; but not when it is *odiosum*; for instance, a *Statutum* that a daughter shall not inherit, does not extend to property in a foreign State.

(B) A *Statutum* which *confers a capacity, i.e.* which enables an unemancipated child to make his testament, or a spurious child to inherit, has no extra-territorial effect. The individual so capacitated can make no use of his privilege out of the State, nor affect, by means of it, property in another State, especially if thereby *alteri civitati præjudicatur.*

(C) As to *successio ab intestato*—the *Statutum* of the place in which the property is governs this matter; but then the character of the *Statutum* is to be considered: if it be *in rem conceptum, e.g. bona veniant in primogenitum,* then it applies to the property of the foreigner, situate in the State: but not if the *Statutum* be *in personam conceptum, e.g.* that *primogenitus succedat,* because *dispositio circa personas non porrigitur ad forenses.*

CCCLXI. Such is the outline of the famous commentary out of which was afterwards elaborated the generally accepted division of Statutes which has been already mentioned, and concerning which it now remains to make some observations.

CCCLXII. The division of *Statuta,* adopted since the close of the sixteenth century and the writings of *Argentræus* or *D'Argentré* (c), has been into

1. Statuta personalia.
2. „ realia.
3. „ mixta.

(c) *Bertrand d'Argentré* presided over the principal Tribunal of Rennes—flourished in the middle of the 16th century—wrote *Commen-*

Statuta personalia purported to be those positive laws which had for their principal object the *person* and his *status*, although they might collaterally and indirectly affect his property.

Statuta realia purported to be those positive laws, which had for their principal object *immoveable property*: although they also might indirectly and collaterally affect the persons.

Statuta mixta (*d*) purported to be those positive Laws which had not for their principal object *persons* or *things*, but the *acts* and *obligations* of individuals: according to some jurists, only *the form* of these *acts* and *obligations*; according to others, not only their *form*, but their *matter and substance* (*vinculum obligationis*). *Statuta mixta* included, also, all that related to the legal establishment and enforcement of claims: according to many jurists, *actions*, or the form and mode of procedure in legal acts, whether judicial or extra-judicial: according to other jurists, they referred to both Persons and Things—*conjunctim de utrisque* (*e*).

CCCLXIII. Though the limits of these respective *Statuta* have been narrowed by some, and extended by other jurists, and great difference of opinion and divergence of practice have always prevailed in their application to particular cases; still, on the whole, and practically speaking, they may be summed up as follows (*f*).

Personal Statutes attach to all persons domiciled in the

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tarios in patrias Britonum leges, seu consuetudines generales Ducatûs Britanniæ.

J. Voet, lib. i. tit. iv. pars ii. 2.

Savigny, R. R. viii. s. 361.

(*d*) *P. Voet, De Statutis*, sect. iv. cap. ii. § 4, says :—"Mixta dicentur meo sensu quæ licet forte vel in rem vel in personam loquerentur, non tamen principaliter de re vel de personâ disponant, verum de modo vel solennitate in omnibus negotiis et causis sive judicialibus sive extrajudicialibus adhibendâ."—See *Fœlix*, Titre prélim. ch. iv. s. 21.

(*e*) So *Burgundus, Rodenburg, Boullenois.* See *Fœlix*, ubi sup.

(*f*) *Savigny, R. R.* viii. s. 361.

territory of the statute-making authority, and ought to be recognised and applied by the judgment of a foreign tribunal.

Real Statutes attach to all immoveable property, and ought to receive a similar recognition.

Mixed Statutes apply to all acts (*Handlungen; actes*) done in the territory of the statute-making authority, and the law of that territory ought to be applied to them.

CCCLXIV. This chapter may not improperly be closed by a reference to the opinions of three modern jurists, of great celebrity upon the subject of it.

The Italian *Rocco* adheres to the twofold division into Personal and Real Statutes, but rejects the category of Mixed Statutes: the subject of them, he says, should be transferred either to Personal or Real, according as the Person or the Property be the predominant element or principal object (*g*).

The French *Fœlix* adopts the threefold division, understanding by Mixed Statutes, *acts* or *obligations*, and thereby assimilating the division to that transplanted from the commentaries of Gaius into the Institutes, "omne jus "vel ad personas pertinet vel ad res vel ad actiones;" for "actiones" or suits (*demandes*), the effect, Fœlix substitutes "acta" or "obligationes," which he designates the cause (*h*).

The German *Savigny*, the prince of modern jurists, pronounces the division to be capable of the most various meanings and applications, and therefore, of course, to contain some true doctrine. But he rejects the division for himself as altogether unsatisfactory, and, on account of its ambiguity, unsafe as a basis of Private International Law (*i*).

(*g*) "In somma le leggi miste non esistono. Sono elle o reali o personali a secondo che le cose o le persone ne sieno l' obbietto principale e diretto."—Libro i. cap. ii. p. 23.

(*h*) Titre prélim. chap. iv. s. 21.

(*i*) *R. R.* viii. s. 361.

It must not be supposed, however, that though these eminent men differ so widely as to the philosophical truth of the division in question, they differ as widely upon the expediency and equity of the doctrine which it was the intention of the framers of this division to enforce. This is not the case: they are substantially unanimous upon the most material points of Private International Law. For instance, all are agreed as to what law ought to govern the *Status* of the Individual in a foreign State: and it should be observed here that the terms *Personal Statute* and *Status* are nearly identical in their signification.

"Les Statuts personnels" (D'Aguesseau says) "sont "ceux qui affectent la personne, qui forment ce qu'on "appelle son *état*, qui le rendent incapable, non pas de "disposer de tels ou tels biens, mais de contracter de "faire tels ou tels actes; en sorte que l'acte est nul en "soi et indépendamment de son exécution" (*k*).

This observation leads us to the consideration of the Law which governs the *Person* and his *Status*, the subject of the next chapter.

(*k*) Cited in *Fœlix*, Titre prélim. chap. iv. s. 22. See *D'Aguesseau*, *Œuvres*, tome v. pp. 281-283, (ed. *Pardessus*), Plaidoyer 54.

NOTES ON THE FOREGOING CHAPTER.

The edition of Bartolus which I have used, is the one published Venetiis MDCII., a fine copy which belonged to the College of Advocates at Doctors' Commons. It will be seen that the part interesting to the student of Private International Law begins at the 14th section of the following heading to the chapter; but I have given the heading entire, partly on account of its novelty to the English reader.

De Summâ Trinitate—*Rubric. Lex Prima.*

1. Relativum, *quis*, ponitur declarativè, augmentativè, et restrictivè.
2. Lex non debet esse de ludibrio.
3. Verbum, *volo*, quandoque inducit dispositionem.
4. Relativum, *quis*, vel *qui*, est relativum substantiæ.
5. Religio, quo modo sumatur, et quid nobis afferat.
6. Usuræ quando possunt de mente et voluntate juris civilis exigi et ut interesse peti. Nu. 8.
7. Minus malum permittitur, ut evitetur majus.
9. Dementia alia vera, alia ficta.
10. Argumentum de perjuro ad hæreticum, quando procedat.
11. Hæretici hodie sunt infames, et repelluntur a testimonio.
12. Infames de facto quando possunt testificari.
13. Hæretici quâ pœnâ puniantur.
14. Statutum loci contractûs quoad solennitatem ejus attenditur.
15. Quoad ordinem [? ordinationem] litis inspicitur locus judicii.
16. Locus contractûs circa dubia, quæ oriuntur tempore contractûs, secundum naturam ipsius inspicitur, fallit in dote. Nu. 17.
18. Statuta quænam circa dubia, quæ oriuntur post contractum, propter negligentiam, vel moram, attendantur.
19. Statutum loci viri, quoad lucrum dotis, inspicitur.
20. Restitutio ex læsione contingente in ipso contractu, quando petitur, quod statutum attendatur. Forensis delinquens in loco secundum quæ statuta puniatur.
21. Statutum, quòd testamentum coram duobus testibus possit fieri, valet; et Nu. 22. Et an comprehendat forensem ibi testantem, Nu. 24.
23. Solennitas publicandi testamentum, potest per statutum minui, et mutari.
25. Statutum circa ea, quæ sunt voluntariæ jurisdictionis, comprehendit forenses.
26. Statutum, quòd filiusfamilias possit testari, non comprehendit filiumfamilias ibi testantem.
27. Statutum ubi res est sita, servari debet.

28. Statutum, et consuetudo laicorum, quando ligent clericos, et servari debeant in curia episcopi.

29. Statuta contra privilegia clericorum dicuntur esse contra libertatem ecclesiæ.

30. Consuetudo laicorum in his, quæ pertinent ad processum, servatur in loco ecclesiastico.

31. Statutum, quòd testamenta insinuentur, ligat clericos.

32. Statutum quandoque porrigit effectum extra territorium.

33. Statutum quòd filia femina non succedat, cum sit prohibitorium, et odiosum, non trahitur ad bona alibi sita.

34. Statutum permissivum quando habeat locum extra territorium.

35. Instrumenta confecta a notario extra territorium, faciunt ubique fidem.

36. Testamentum conditum coram quatuor testibus, secundum dispositionem statuti loci, valet, etiam quoad bona sita extra territorium.

37. Lex potest facere, quòd quis decedat pro parte testatus, et pro parte intestatus.

38. Statutum habilitans personam, quando trahatur extra territorium ; et Nu. 41.

39. Actus voluntariæ jurisdictionis non possunt exerceri extra jurisdictionem concedentis, qui sit inferior a principe ; Nu. 40.

41. Aditio hæreditatis porrigit effectum suum extra civitatem ; et Nu. 43.

42. Consuetudo Angliæ, quòd primogenitus succedat in omnibus bonis, quando trahatur ad bona alibi sita.

44. Statutum punitivum, quando porrigat effectum suum extra territorium.

45. Delinquens in loco, efficitur de jurisdictione loci.

46. Forenses duo existentes in exercitu Perusino, si in territorio Aretino delinquant, poterunt puniri per potestatem Perusii.

47. Statutum punitivum simpliciter loquens, quando comprehendat civem delinquentem extra territorium, ad hoc, ut possit contra eum procedi, et puniri secundum statuta suæ civitatis ; et Nu. 48.

49. Cautela in formanda inquisitione contra civem delinquentem extra territorium.

50. Pœna imposita, quando extendat effectum suum extra territorium judicantis.

51. Publicatio bonorum an extendatur ad bona alibi sita. Et ad quem dominum pertineant.

The 14th Section begins as follows :—

"Nunc veniamus ad Gloss. quæ dicit *Quod si Bon.* &c. cujus occasione videnda sunt duo, et primò utrum statutum porrigat extra territorium ad non subditos,—secundò utrum effectus statuti porrigat extra territorium statuentium.

"Et primò quæro quid de contractibus. Pone contractum celebratum per aliquem forensem in hâc civitate, litigium ortum est et agitatur

lis in loco originis contrahentis. Cujus loci statuta debent servari vel spectari, quia illæ quæstiones sunt multum revolutæ omissis aliis distinctionibus plenius quæ Doctores dicant hic distingue.

Aut loquimur de statuto aut de consuetudine quæ respiciunt ipsius contractûs solennitatem aut litis ordinationem, aut de his quæ pertinent ad jurisdictionem ex ipso contractu evenientis executionis.

14. Primo casu inspicitur locus contractûs (ut l. si fundus de evic. et l. 2 quem ad test. ap.).*

Secundo casu aut quæris de his quæ pertinent ad litis ordinationem et inspicitur locus judicii, . . . † aut de his quæ pertinent ad ipsius litis decisionem, et tunc, aut de his quæ oriuntur secundum ipsius contractûs naturam tempore contractûs, aut de his quæ oriuntur ex post facto propter negligentiam vel moram. Primo casu inspicitur locus contractûs, ‡ et intelligo locum contractûs ubi est celebratus contractus, non de loco in quem collata est solutio. Nam licet fundus debeat solvi ubi est tunc inspicitur locus celebrati contractûs. Fallit in dote § ut, &c. propter rationem ibi positam in textu.

Secundo casu aut solutio est collata in locum certum aut in pluribus locis alternativè, ita quod electio sit actoris, aut in nullum locum quia promissio fuit facta simpliciter.

Primo casu inspicitur consuetudo quæ est in illo loco in quem est collata solutio. ‖

Secundo et tertio casu inspicitur locus ubi petitur. ¶

"Ratio prædictorum est quia ibi est contracta negligentia seu mora."

Then Bartolus proceeds to say:—

"Ex prædictis possunt solvi multæ quæstiones," and he gives an example:—"Statutum est Assisii, unde est mulier ubi est celebratus contractus dotis et matrimonii, quòd vir lucretur etiam [? tertiam] partem dotis uxore moriente sine liberis; in hâc verò civitate Perugii, unde est vir, statutum est quòd vir lucretur dimidium, quid spectabitur? certè statutum terræ viri."

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* Every position in the text of Bartolus professes to be built upon *dicta* of the Roman Law. *Wächter* and *Savigny* have, however, clearly shown that these *dicta* frequently do not support the positions in the text.

Dig. lib. xxi. t. ii. 6. "Si fundus venierit, ex consuetudine ejus regionis in quâ negotium gestum est pro evictione caveri oportet."

Cod. lib. vi. t. xxxii. 2. "Testamenti tabulas ad hoc tibi a patre datas, ut in patriam perferantur, affirmans, potes illuc perferre ut secundum leges moresque locorum insinuentur."

† *Dig.* lib. xxii. t. v. 8, *in fine.* "Quod ad testes evocandos pertinet diligentiæ judicantis est explorare quæ consuetudo in eâ provinciâ, in quâ judicat, fuerit," &c.

‡ Refers again to *Dig.* lib. xxi. t. ii. 6, and to *Dig.* lib. xliv. t. vii. 21. "Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit."

§ *Dig.* lib. v. t. i. 65. "Exigere dotem mulier debet illic ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est."

‖ Refers to *Dig. sed* (pace tanti viri) *quære Cod.* lib. iv. t. ii. si certum petatur, *Dig.* lib. xxxiii. t. vi. &c.

¶ Refers to authorities already cited.

And shortly afterwards another example occurs * :—"Aut quis vult petere restitutionem ex læsione contingente in ipso contractu tempore contractûs, et inspicimus locum contractûs : Aut ex læsione contingente post contractum ex aliis negligentiis, ut morâ, et inspicimus locum, ubi est illa mora contracta, ut ex prædictis apparet : et sic si esset in loco judicii, inspicimus locum judicii." He then considers the other subjects mentioned in the sections of the heading to his chapter ; but a sample, longer, perhaps, than is justified by the size of this volume, has already been given to the reader.

* 20th section.

CHAPTER XVII.

THE PERSONAL STATUTE—STATUS—JUS IN PERSONA POSITUM.

CCCLXV. THE subject of this chapter is the consideration of what Law shall govern the Personal *Status* (*a*) of the individual in a foreign State—the *jus positum in personâ ipsâ cujusque* (*b*); or, in the language of continental jurists, what State is to furnish the *Personal Statute* of an individual commorant in a foreign State.

It is clear that the consideration of the Law which governs the capacity of the individual to acquire jural relations precedes, in the natural order of things, the consideration of the Law which is to govern the jural relations when acquired.

CCCLXVI. Is, then, this Law to be the Law of the Foreigner's Origin (*Originis*)? the Law of his Domicil (*Domicilii*)? the Law of the place in which the act has been done, or the contract entered into, which occasions the enquiry (*lex loci actûs vel contractûs*), or the Law of the place in which he happens to be at the time when the question is raised (*lex fori*)?

CCCLXVII. The due investigation of this subject requires the following arrangement:—To consider—

1. The doctrine which prevails out of England and the United States of North America.

(*a*) According to Story, "persons, their capacity, state, and condition."—*Confl. of L.* s. 50. See *Wharton*, chap. iii. Personal Status; *Bar*, Dritte Abtheilung, c. ii.: Die Rechts- und Handlungsfähigkeit (Status). *Cockburn* (*Lord Chief Justice*) *on Nationality*: London, 1869.

(*b*) *Donellus, De Jure Civili*, lib. i. c. i. 2, 3.

2. The doctrine which prevails in England and the United States of North America.

3. The limitations which confine the application of both doctrines.

CCCLXVIII. *First*, as to the doctrine which prevails out of England and the United States of North America; an overwhelming majority of authorities upon the subject pronounce that the Law which governs the *Status* is the Law of the Domicil (*c*):—a great majority pronounce that if the *Domicil of Origin* has been abandoned, and a new one acquired, the law of the latter—that is, the law of the *actual Domicil*—ought to govern.

CCCLXIX. It is not, however, contended that the law of the new domicil has any retroactive effect on obligations contracted, or acts done under the Law of the old domicil. It is, of course, assumed that such acts and obligations are of a private and not a public character (*d*);—that they concern the individual, and not the State.

CCCLXX. It is obvious that this proposition as to the paramount authority of the law of the actual domicil may,

(*c*) ["Auf die verschiedene Zustände der Person, wodurch die Rechtsfähigkeit und Handlungsfähigkeit bestimmt wird, ist nur eine reine einfache Anwendung desjenigen örtlichen Rechts möglich, welchem die Person selbst durch ihren Wohnsitz angehört."—*Savigny*, *R. R.* viii. s. 362. *Vide post*, § ccclxxiv. note (*g*).] "*Le qualità personali* legittimamente infisse nel luogo del domicilio si mantengono mai sempre intere col mutar che si fa della residenza e passaggiera dimora."—*Rocco*, lib. i. cap. xii. p. 111. "Il principio cui vuolsi tener fermo si è, come abbiam detto di sopra, che le leggi personali del domicilio accompagnano gl' individui in tutti i luoghi della terra."—*Ibid.* lib. ii. cap. viii. p. 147. What can be stronger? "La loi personnelle de chaque individu, la loi dont il est sujet quant à sa personne, est celle de *la nation dont il est membre*. . . . La loi de cette nation est sa loi personnelle, depuis le premier moment de son existence physique."—*Fœlix*, liv. i. tit. i. s. 27. This, it will be observed, however, is Law of Origin, not necessarily of Domicil.

(*d*) The Scotch Courts pronounced a divorce upon a marriage contracted between English persons in England, when marriage was indissoluble, on the ground that marriage is a contract of a *public* character, and that the incidents of it must be subject to the laws of the country in which the contracting parties reside.

unless, indeed, it be universally incorporated into the Municipal Law of each State, tend to a collision of laws in various ways:—

1. Between the Law of the Origin, or the Domicil of Birth, and the Law of the actual Domicil; when the sentence of the latter requires execution in the country of the former.

2. Between the Law of Origin and of the Domicil, and the Law of the place where the contract is entered into, or the act done.

3. Between the Law of the Domicil and the Law of the place in which the thing adjudicated upon happens to be situate.

It is the more necessary to mention these modes of collision, because in Story's elaborate and learned work, the *Conflict of Laws*, they are not always very clearly discriminated (*e*).

CCCLXXI. The position, however, already stated—viz. that the Law of the domicil determines the *Status*, and therefore travels with the person, binding on him all its capacities and incapacities, wherever he goes—rests, as an abstract proposition, upon a very largely preponderating authority of jurists,—upon the recognition of it by courts of justice,—and has, moreover, been expressly incorporated into the positive legislation of the principal States on the European Continent.

CCCLXXII. By the *Code Civil* of France (Article 3) it is enacted, "Les lois concernant l'état et la capacité "des personnes régissent les Français, même residant en "pays étranger."

It is true that this law in its terms affects French *citizens* only, and does not expressly declare that the *Status* and *capacity* of the *foreigner* commorant in France will be governed by the law of the foreigner's country. But it clearly appears from the discussions which preceded the

(*e*) Cf. ss. 55, 70, 73, 77, 81, 83, 94.

incorporation of this article into the Code, that such was the intention of the framers of the law: such, too, has been holden to be its effect by the highest authorities in France, and by the decisions of the first tribunals in that State (*ee*).

CCCLXXIII. Belgium adopts the Law of France in this matter, and so do the cantons of Geneva, Vaud, and Berne (*f*).

CCCLXXIV. The Austrian Code (*ff*) provides that the personal capacity of the Austrian subject shall be governed by the Law of his domicil as to transactions in another country; and with respect to foreigners, that their personal capacity shall be determined according to the laws of their country, and that their country shall be taken to be the place of their domicil, and, if they have no proper domicil, the place of their birth (*g*); unless the Austrian

(*ee*) *Fœlix*, liv. i. titre i. s. 32, cites *Pardessus*, *Toullier*, *Caboin*, *Merlin*. This last author observes :—"Du principe que les lois Françaises concernant l'état et la capacité des personnes régissent les Français, même residant en pays étranger, il suit tout naturellement que, par réciprocité, les lois qui régissent l'état et la capacité des étrangers, les suivent en France; et que c'est d'après ces lois que les tribunaux Français doivent juger s'ils ont ou n'ont pas tel état, s'ils sont capables ou incapables."—*Rép. de Jur.* Loi, VI. s. 6.

The discussion arose on the first part of the third article, "Les lois de police et de sûreté obligent tous ceux qui habitent le territoire."

The doctrine in the text is maintained by an *arrêt* of the Cour Royale of Paris, 1836; by another of the 25th November, 1831; by one of the Cour Royale of Bordeaux, of 15th July, 1841; by a judgment of the Tribunal de Première Instance at Paris, in 1842. There is a decision of the Cour Royale at Paris, 15th March, 1831, which is of a contrary tenor; but the circumstances of the case were peculiar.

Savigny, *R. R.* viii. s. 363, § 3, agrees with *Fœlix*.

[(*f*) *Fœlix*, *ubi sup.*]

(*ff*) *Oesterr. bürgerliches Gesetzbuch*, ss. 4, 33, 34.

(*g*) *Die gesetzliche Behandlung der Ausländer in Oesterreich*, *von D. Püttlingen*, s. 47.

Fœlix, *ubi supra*.

Savigny, *R. R.* viii. s. 363, § 2.

Savigny, *ibid.* s. 362, is most decided and uncompromising in maintaining the law of the Domicil as the true law for deciding the *Status*.

"Meine Meinung geht also vielmehr dahin, dass Jeder in seinen

Law shall have, as in the case of slavery and serfdom, specially provided otherwise.

CCCLXXV. The Prussian Code enacts as a fundamental proposition, "That the personal qualities and "capacities of a man are to be determined according to "the laws of the Judicial Tribunal to which his true and "proper Domicil" (*eigentlicher Wohnsitz—domicile réel*) "is subject" (*gg*).

This proposition relates to Prussian subjects, and does not distinguish between the exercise of their capacity at the place of their domicil and its exercise elsewhere. With respect to foreigners, the same Code provides as follows:—"The subjects of Foreign States who live or "carry on business in this country are to be judged "according to the above enactments" (*h*).

CCCLXXVI. It will be seen hereafter that these principles, both of the Austrian and Prussian Law, receive some modification in their application to questions concerning the validity of contracts—modifications which have for their excellent object the maintaining the substantial and real intention of the engagement.

CCCLXXVII. The Bavarian Code provides that *in causis merè personalibus*, recourse shall be had to the Law of the domicil (*hh*).

The Code of the Grand Duchy of Baden adopts the rule of the French Code, with a most material exception, as to all questions relating to contract (*hh*)—an exception which has a tendency to assimilate the Law of Baden to that which prevails in Great Britain and North America.

CCCLXXVIII. The Law of Holland appears to con-

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persönlichen Zuständen stets nach dem Recht seines Wohnsitzes zu beurtheilen ist; ohne Unterschied, ob darüber im Inland oder im Ausland geurtheilt werde; eben so aber auch ohne Unterschied, ob die persönliche Eigenschaft an sich, oder die rechtliche Wirkung derselben, beurtheilt werden soll."

(*gg*) *Allgemeines Landrecht für die Preussischen Staaten*, Einleitung, § 23. See too § 25.

(*h*) *Ibid.* § 34.

(*hh*) *Fœlix, ubi sup.*

tain a yet greater infraction of the general principle: for it provides that the Dutch Laws relating to the Status shall bind the Dutchman in every other country; but that the foreigner, resident in Holland, shall be subject to the Dutch Law only, and not to the Law of his domicil (*i*).

CCCLXXIX. As to the Italian States.

Sardinia adopted in her *Codice Civile* the three propositions of the third Article of the French Code; and, it is presumed, would have applied them also to foreigners.

The Papal States enacted, in 1836, that the Personal Law of the domicil followed the subject of it everywhere.

The Two Sicilies, according to the opinion of M. Fœlix, resembled the Dutch; because—though they incorporated into their Code the three propositions, above referred to, of the French Code—they, by their fifth Article, declared that the laws are binding on all who dwell in the land, whether they be citizens, domiciled strangers, or sojourners; and did not accompany the statement with the reservation as to "les lois *de police et de sûreté*" of the French Code. Yet, no author lays down the rule that personal qualities depend on the Law of the domicil more strenuously than Rocco (*ii*), the principal Neapolitan writer

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[(*i*) "6. De wetten, betreffende de regten, den staat en de bevoegdheid der personen, verbinden de Nederlanders, ook wanneer zij zich buiten 's lands bevinden.

"7. Ten opzigte van onroerende goederen geldt de wet van het land of der plaats, alwaar die goederen gelegen zijn.

"8. De *strafwetten* en de *verordeningen van policie* zijn verbindende voor allen, die zich op het grondgebied van het Koningrijk bevinden.

"9. Het burgerlijk regt van het Koningrijk is *hetzelfde voor vreemdelingen*, als voor de Nederlanders, zoo lang de wet niet bepaaldelijk het tegendeel vaststelt.

"10. De vorm van alle handelingen wordt beordeeld naar de wetten van het land of de plaats, alwaar de handelingen zijn verrigt." *Dutch Code.* Wet houdende algemeene bepalingen der wetgeving van het Koningrijk. Arts. 6–10.]

(*ii*) "Le qualità personali legittimamente infisse nel luogo del domicilio si mantengono mai sempre intere col mutar che si fa della residenza e passaggiera dimora. Quantunque il diritto delle genti, che necessario dai gius-pubblicisti si appella, non ordini questa vicendevole

on the Conflict of Laws, on whose authority M. Fœlix is in the habit of relying.

Italy has now enacted, in the 6th Article of the Preliminary Dispositions of her Code, that the personal law of the Domicil shall follow the subject of it everywhere (*j*).

CCCLXXX. Russia appears to have no law analogous to or resembling the third Article of the French Code, but to contain provisions in the same spirit and to the same effect as those already referred to in the Dutch Law. The Russian enactment as to the foreigner is, "Pendant "tout le temps de son séjour il est soumis, quant à la "personne et ses biens, aux dispositions des lois Russes, "et a droit de leur protection;" though in the preliminary title of the new Civil Code of Poland (existing in 1861) the third Article of the French Code was introduced (*k*).

CCCLXXXI. *Secondly*, we have to consider the doctrine on the subject of the Personal *Status* which prevails in England and the United States. The jurisprudence of the United States of North America, and, in some respects, that of England also, differs materially from the doctrine of the codes and jurists of the European continent (*l*).

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applicazione e autorità delle leggi di uno stato sul territorio dell' altro. Nissuna primitiva obbligazione stringe le nazioni a riconoscere provvedimenti stranieri. Nullameno il diritto delle genti volontario, il quale intende alla perfezione progressiva dei popoli, altamente il richiede." —*Rocco*, lib. i. cap. xii. pp. 111, 112.

[(*j*) "6. Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono.

"7. I beni mobili sono soggetti alla legge della nazione del proprietario, salve le contrarie disposizioni della legge del paese nel quale si trovano.

"I beni immobili sono soggetti alle leggi del luogo dove sono situati."—*Codice Civile*. Disposizioni. Arts. 6, 7.]

(*k*) *Fœlix, ubi supra*, [citing the Russian "Lois Fundamentales," 63].

The *Revue Etrangère et Française de Législation*, tome iii., contains a translation of that part of the Russian Code which relates to "*Législation Internationale de l'Empire Russe.*" Page 550 contains the provisions respecting "*Etranger en Russie.*"

(*l*) *Story, Conflict of Laws*, ss. 100-106.

See 1 *Burge*, pp. 131-134.

It is, indeed, true that the *Status* of persons with respect to acts done and rights acquired *in the place of their domicil*, and contracts made *concerning property situated therein*, will be governed by the law of that domicil; and that England and the United States will hold as valid or invalid *such* acts, rights, and contracts, according as they are holden valid or invalid by the Law of the domicil (*ll*). But this proposition is very far from being equivalent to the proposition of the French Code,—viz. that the Laws which concern the *status* and capacity of persons govern Frenchmen, even when resident in a foreign country (*m*).

CCCLXXXII. The state of jurisprudence presented by the practice of the English and American tribunals upon the question of the *Personal Status* of foreigners will be found very unsatisfactory, whether it be considered with reference to Comity, as being at variance with the law of the rest of the Christian world, or with reference to its own domestic jurisprudence, being marked by painful and clumsy inconsistencies.

No impartial person can rise from the perusal of Story's fourth chapter on the "Capacity of Persons," occupying nearly one hundred and thirty closely printed pages, without a sense of the confusion into which the jural relations of mankind are plunged in a great measure, though certainly not altogether, by the peculiarity of what is called the "*Common Law*."

CCCLXXXIII. It will be necessary in the following chapters to consider whether there are or are not grave discrepancies between the English and Continental Law on the subject of *Status*, *e.g.* in the chapters relating to disabilities incident to minority. It will be sufficient, in this place, to notice the principal features. Story—pressed by the weight of his own erudition—knowing how much

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[(*ll*) See *Cooper* v. *Cooper*, *L. R.* 13 *App. Ca.* p. 88.]

(*m*) *Vide antè*, § cccLxxii. [Cf. *Dutch Code*, *antè*, § cccLxxviii. note.]

the law of the United States of North America differed from that of the rest of Christendom on this point, and anxious to defend the "Common Law," is driven to the necessity of making such statements as these:—"The "truth, however, seems to be that there are, properly "speaking, no universal rules by which nations are, or "ought to be, morally or politically bound to each other "on this subject. . . . But whatever rules it may adopt, or "whatever it may repudiate, will be alike the dictate of "its own policy and sense of justice; and whatever it may "allow or withhold will always be measured by its own "opinion of the public" (*i.e.* the domestic) "convenience "and benefit, or of the public prejudice and injury, result-"ing therefrom" (*n*).

These observations are made generally, it must be remarked, not with respect to the particular exceptions demanded by the public policy of the State, but with respect to personal qualities of a general nature; and it is obvious that if his doctrine be sound, there is an end altogether, so far as *Status* is concerned, of a *Jus Gentium* and of Private International Law, founded upon the theory of a community of States. It is a matter of indifference (Story says) whether a country suffer the *Status* of foreigners to be governed by the Law of their Domicil or not—whether it adopt the Law of their "actual Domicil" according to "the more general doctrine;" or, according to "the stricter doctrine," it adopt the Law of "the Domicil of Birth:" probably the former, he says, is the most safe and convenient rule (*nn*). But surely this is a false standard and a Lesbian measure. The question, in matters of this *universal* character—in which no consideration of imperial policy or constitutional law is concerned, —is, what does universal justice demand? not what does the supposed convenience of a particular State require.

(*n*) *Conflict of Laws*, s. 73.
(*nn*) *Ibid.*

See the consequence. The Court of Louisiana (*o*), in a celebrated and leading case, came to this monstrous conclusion,—viz.: that they would recognize the personal disability of a foreigner in a case of minority, where it was contrary to their own law on the subject, if such recognition helped to sustain a contract with an American citizen; but if it had the opposite effect, they would refuse to recognize it—in the one case the *lex domicilii*, in the other the *lex loci contractûs* ought to govern. Now, Story is at a loss to understand this decision, he says:—"Such a course of decision certainly may "be adopted by a *government* if it shall so choose. But, "then, it would seem to stand upon mere arbitrary legis- "lation and positive law, and not upon principle. The "difficulty is in seeing how a *court*, without any such "positive legislation, could arrive at both conclusions" (*oo*). But if, in the case of a foreigner, a court may mete out justice according to its opinion of what is best for "the "public convenience" of its own State, the difficulty does not seem great. "Public convenience," considered altogether apart from private justice, may point out, as it appears to have done, the adoption of both principles, though absolutely repugnant to each other.

It is very remarkable that the same Court appears previously to have laid down, in substance, the general European Doctrine, "that the Laws of the Domicil of "Origin govern the state and condition of the minor into "whatever country he removes" (*p*), and "that personal "incapacities communicated by the laws of any particular "place, accompany the person wherever he goes" (*q*).

The Court appears to have departed from this doctrine

(*o*) *Saul* v. *His Creditors*, 5 *Martin's* (*Americ.*) *Reports*, New Series, at pp. 596-598.

(*oo*) *Conflict of Laws*, s. 76.

(*p*) *Ibid.* s. 77. *Barrera* v. *Alpuente*, 6 *Martin's* (*Amer.*) *Rep.* N. S., p. 69. [See *Lamar* v. *Micou*, 5 *Davis' Supr. Court U.S.A. Rep.* p. 471.]

(*q*) *Ib.* s. 78. *Le Breton* v. *Nouchet*, 3 *Martin's* (*Amer.*) *Rep.* p. 60.

in later cases; but they are remarkable as being, I believe, the only instances in which the European Doctrine of *Status* has been maintained by a Court in the United States of North America.

An English President of the Court of Demerara and Essequibo, Mr. Henry (*r*), in giving judgment on a plea of English certificate of bankruptcy in bar, in a foreign jurisdiction, to the suit of a foreign creditor, observes as follows:—"Again, the effect which one country gives to "the laws of another, is further shown in the case of pro- "digals, minors, idiots, lunatics: these qualities accom- "pany the person everywhere, when attached to him by a "competent jurisdiction in his own country, so far, that "the foreign judge will confirm them as to property in "his own jurisdiction" (*rr*). And the learned judge in the preface to the report of his judgment remarks, "Although "the universal admission of Foreign Law in any State "would be highly dangerous, yet, the knowledge and ad- "mission of it in those cases which are of an *universal* "*nature*, as those of bankruptcy, idiocy, lunacy, majority, "minority (*s*), marriage, and wills, and which necessarily "affect the intercourse of different States with each other, "would, for many reasons to be seen in the course of the "work, be highly desirable and advantageous to commer- "cial intercourse" (*t*). And again, "Personal universal "qualities of whatsoever kind, by virtue of the third general "proposition, and the Comity of nations, accompany the "person everywhere" (*u*).

(*r*) *Henry, Odwin* v. *Forbes* (A.D. 1823). This important judgment was confirmed on appeal, and was dedicated, *by permission*, to Sir W. Grant. It is, or was, entitled therefore to every respect. Yet some of the principles contained in it have been, as will be seen, entirely departed from.

(*rr*) *Henry, ibid.* p. 96.

(*s*) This is not to be reconciled with *Ruding* v. *Smith*, 2 *Haggard's Consistory Reports*, pp. 389–393.

(*t*) *Henry, ibid.* Preface, pp. viii, ix.

(*u*) *Henry*, p. 5.

CCCLXXXIV. But the English Courts have been supposed to hold that certain incapacities attached by the Law of their domicil to minors do not necessarily travel with them into other countries, and to have pronounced contracts of marriage (*v*), as well as contracts for loans of money (*x*), by English persons, valid according to the *lex loci contractûs*, but invalid according to the Law of the English domicil, to be valid contracts in England. While, on the other hand, they have holden that certain incapacities, attached by the *lex domicilii*, do travel with the individual, and have refused to recognize the validity of a second marriage, contracted by English persons during the life of the first wife, after a divorce by a foreign State of an English marriage (*y*): they have also refused to recognize the validity of an English marriage abroad, within the prohibited degrees of affinity (*z*).

So they have refused to recognize marriages contracted abroad in evasion of the English Statute, respecting the Royal Family (*a*).

And the English Courts have also made the following irreconcileable decisions. They have holden that the legitimacy of a person depends on the Law of his Origin or Birth (*b*); and yet, that a person legitimate by that Law (*c*) may be incapable of inheriting *real* estate in England, because he was not legitimate for that purpose (*d*).

(*v*) *Dalrymple* v. *Dalrymple*, 2 *Haggard's Consistory Reports*, p. 54.

(*x*) *Male* v. *Roberts*, 2 *Espinasse, Nisi Prius Rep.* p. 163.

(*y*) *Conway* v. *Beasley*, 3 *Haggard's Eccles. Reports*, p. 639.

Lolly's Case, 1 *Russell & Ryan's Cases*, p. 239.

[*Shaw* v. *Attorney-General*, *L. R.* 2 *P. and M.* p. 156.

Shaw v. *Gould*, *L. R.* 3 *H. L.* p. 55. See now *Harvie* v. *Farnie*, *L. R.* 8 *App. Ca.* p. 43 (A.D. 1882), in which Lolly's case is explained.

Sottomayor v. *De Barros*, *L. R.* 5 *P. D.* p. 94.]

(*z*) *Brook* v. *Brook*, 3 *Smale & Giffard's Reports*, p. 48; 9 *H. Lords' Cases*, p. 193.

(*a*) *Duke of Sussex' Case; vide post.*

(*b*) *Re Wright's Trusts*, 2 *Kay & Johnson's Rep.* p. 575; *post*, § dxli.

(*c*) *e.g.* legitimate *per subsequens matrimonium; vide post*, § dxxxv.

(*d*) *Birthwhistle* v. *Vardill; post*, § dxxxvii.

The English Law would probably respect the *patria potestas* of a foreign father (*e*), that is, within all reasonable limits.

This question will be found more fully discussed in a subsequent chapter (*f*).

CCCLXXXV. The true doctrine of Modern International Law, in its relation to Private Persons, is correctly stated by Bar (*g*); namely, that, whether with regard to the administration of civil or of criminal Law, the Foreigner, apart from particular exceptions expressly named, ought to be placed exactly on the same footing as native subjects. This was the doctrine maintained by the great medieval jurists of Italy.

Discriminations between the foreigner and the native have often been made, on grounds of public policy, with regard to the tenure of landed property, and also with respect to arrest, bail, and giving security for costs in civil causes. But these last are not instances of inequality of treatment, for it is manifest that these precautions are necessary to put the native on the same footing as the foreigner; the latter being generally free from those impediments to flight from the country, which naturally obstruct the action of the latter. Against the maxim here laid down the French Law has been in its letter the chief offender. To say the least, that law as at present

(*e*) *Johnstone* v. *Beattie*, 10 *Clarke & Fin. Rep.* p. 114; *post*, § dxlviii.

(*f*) Chap. xxv. On *Guardianship*. See this subject further considered in chapters xviii.–xxii. on *Marriage and Divorce*, especially the case of *Simonin* v. *Mallac*, 2 *Swabey & Tristram's Rep.* p. 67.

(*g*) *Das Intern. Privat- und Straf-Recht*, zweite Abtheilung, § 27. Bar says: "Das Französische Civilgesetzbuch hat zwar mehr als andere Gesetzbücher die Fremden gegenüber den Franzosen benachtheiligt." He refers to the distinction between *droits civils* and *naturels*, established to the injury of the Foreigner by the *Code Civil*, arts. 13 and 14, and *Code de Commerce*, art. 575. He points out how the best French jurists have striven to interpret the law so as to give equality of rights to foreigners and natives. An abridgement of Bar's chapter will be found in *Wharton*, § 123 (*b*), note. [See Gillespie's translation of Bar's work, p. 71, edit. A.D. 1883. Edinburgh.]

judicially interpreted, with respect to the *persona standi* of the foreigner before the French tribunals, and the application of foreign law to foreign contracts or acts, cannot be pronounced satisfactory. It would seem that there is, *practically*, a discretion left to the Court as to the application of the foreign law, and that the rejection of it by the Court does not found the jurisdiction or warrant the interference of the Court of Cassation—*ne peut donner ouverture à cassation*; there must be also the contravention of a French law (*h*). Eminent French jurists, however, hold a sounder and more liberal opinion; they point out that, with respect to the *status* and capacity of the foreigner, the law, generally speaking, is clearly to be derived from the country of the foreigner.

"La disposition du troisième alinéa de l'Art. 3 du Code "Civil autorise à croire que le législateur français a "entendu laisser les étrangers non résidant en France "sous l'empire de leurs lois nationales pour tout ce qui "concerne leur état et leur capacité. Le juge français, "appelé à statuer sur la validité d'un acte passé par un "étranger et attaqué par ce dernier pour cause d'incapa-"cité, doit donc, en général, prendre pour guide de sa "décision la loi nationale de cet étranger" (*i*).

CCCLXXXV.A. It is clearly competent to each State to decide for itself, both whom it will consider to be aliens (*j*), and by what laws they shall be governed in their

(*h*) See this question discussed with learning, good sense, and perspicuity in the "Introduction" by M. Demangeat to the new work, *Journal du Droit International Privé*, Paris, 1874.

(*i*) *MM. Aubrey & Rau* (*Cours de Droit Civil Français*, t. i. § 31, pp. 90–92), cited *ib.* 13—*La Disposition du troisième alinéa de l'Art.* 3 *du Code Civil.*

(*j*) The English Acts relating to aliens apply to Ireland, since the Act of Union, as far as they are Acts affecting the *status* of persons in allegiance to the Sovereign of a United Kingdom.—*Davies* v. *Lynch*, in the Irish Queen's Bench 16 *W. R.* p. 1207.

An alien is a subject of a foreign State who has not been born within the allegiance of the Crown of this kingdom.—*Reg.* v. *Burke*, 11 *Cox, Crim. Law Cases*, p. 138.

various relations to the community. In modern times the necessities of mankind, the extension of commerce, sounder and wider views of policy, have led, and are still leading, to the abolition of restrictions, the creatures of feudal law and national jealousy, upon this subject; which is touched upon in various chapters of this volume and this work (*k*).

The most complete, and in many respects the most surprising, change has been effected, as already mentioned (*l*), no later than during the year 1870, in the law of England (*m*) and the United States of North America.

The English "Naturalization Act" (*n*) of that year contains the following enactments as to

STATUS OF ALIENS IN THE UNITED KINGDOM.

Sect. 2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided,—

(1) That this section shall not confer any right on an alien to hold real property situate out of the United

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The mere production of a passport found on a prisoner, which is proved to be granted by the authorities of a foreign State to natural born subjects only, is not evidence of his being an alien.—*Ibid.*

(*k*) *E.g.* as to the law with respect to Patent Rights and Copyright, *vide post*, chapter xxvii.

(*l*) See vol. i. App. V.

(*m*) This Statute has been decided not to be retrospective.—*Sharp* v. *St. Sauveur* (1873), 41 *L. J. Chanc.* p. 576, *L. R.* 7 *Cha. App.* p. 343.

(*n*) 33 Vict. c. 14. [35 & 36 Vict. c. 39 recites the supplementary convention of Washington of February 23, 1871, and contains a saving clause as to such property of married women as might have been affected by the Naturalization Act of 1870.]

Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise:

(2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him:

(3) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

Sect. 3. Where Her Majesty has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it shall be lawful for Her Majesty, by Order in Council, to declare that such convention has been entered into by Her Majesty; and from and after the date of such Order in Council, any person being originally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person shall be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid.

A declaration of alienage may be made as follows; that is to say,—If the declarant be in the United Kingdom, in the presence of any justice of the peace; if elsewhere in Her Majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law, in the place in which the decla-

rant is, to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

Sect. 4. Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject (*nn*) may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

Sect. 5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject.

EXPATRIATION.

Sect. 6. Any British subject who has at any time before, or may at any time after, the passing of this Act, when in any foreign state and not under any disability, voluntarily become naturalized in such state, shall, from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien. Provided,—

(1) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign state and yet is desirous of remaining a British subject, he may, at any time within two years after

[(*nn*) See *De Geer* v. *Stone*, *L. R.* 22 *Ch. D.* p. 243 as to Common Law and Statutory rules regarding the nationality of children of a British subject and their descendants, born abroad.]

the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration, hereinafter referred to as a declaration of British nationality, being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject; with this qualification, that he shall not, when within the limits of the foreign state in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect:

(2) A declaration of British nationality may be made, and the oath of allegiance be taken as follows; that is to say,—if the declarant be in the United Kingdom, in the presence of a justice of the peace; if elsewhere in Her Majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law, in the place in which the declarant is, to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

NATURALIZATION AND RESUMPTION OF BRITISH NATIONALITY.

Sect. 7. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of Her Majesty's Principal Secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to one of Her Majesty's

Principal Secretaries of State for a certificate of naturalization.

The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

The said Secretary of State may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

An alien who has been naturalized previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same

terms and subject to the same conditions in and upon which such certificate might have been granted, if such alien had not been previously naturalized in the United Kingdom.

Sect. 8. A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of Her Majesty's Principal Secretaries of State for a certificate, hereinafter referred to as a certificate of re-admission to British nationality, re-admitting him to the status of a British subject. The said Secretary of State shall have the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance shall in like manner be required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted shall, from the date of the certificate of re-admission, but not in respect of any previous transaction, resume his position as a British subject; with this qualification, that within the limits of the foreign state of which he became a subject he shall not be deemed to be a British subject, unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

The jurisdiction by this Act conferred on the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession shall, in the case of such person, be deemed equivalent to residence in the United Kingdom.

Sect. 9. The oath in this Act referred to as the oath of allegiance shall be in the form following; that is to say,—

"I do swear that I will be faithful and "bear true allegiance to Her Majesty Queen Victoria, her

"heirs and successors, according to law. So help me "GOD" (*o*).

It is also provided that—

Sect. 13. Nothing in this Act contained shall affect the grant of letters of denization by Her Majesty.

Sect. 14. Nothing in this Act contained shall qualify an alien to be the owner of a British ship.

Sect. 15. Where any British subject has, in pursuance of this Act, become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.

Sect. 16. All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner, and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession.

CCCLXXXV.B. As to American Law on this subject, Mr. Wharton observes, that only a "few years since it "was judicially declared in England that the personal "stamp of nativity was indelible, even to the extent of "determining under what limitations property was to be "held, or marriage contracted, or legitimacy acquired. But "the last four years have witnessed the final and universal "abandonment of this doctrine. In the United States "the question was settled by the Act of July 27, 1868, "which provides that, 'Whereas the right of expatriation "'is a natural and inherent right of all people, indispen-

(*o*) As to national *status* of married women and infant children, *vide post*, chap. XX.; and as to regulations as to registration, and evidence and the definition of terms used in the statute, see vol. i. App. V., where the statute, [with the amending Act of 1872 and the two Conventions of Washington,] is printed at length.

" 'sable to the enjoyment of the rights of life, liberty, and " 'the pursuit of happiness; and whereas in the recog- " 'nition of this principle this Government has freely " 'received emigrants from all nations, and invested them " 'with the rights of citizenship; and whereas it is claimed " 'that such American citizens, with their descendants, " 'are subjects of foreign States, owing allegiance to " 'the Governments thereof; and whereas it is neces- " 'sary to public peace that this claim of perpetual alle- " 'giance should be promptly and finally disavowed, " 'therefore, *be it enacted* that any declaration, instruc- " 'tion, opinion, order, or decision of any officers of " 'this Government, which denies, restricts, impairs, or " 'questions the right of expatriation, is hereby declared " 'inconsistent with the fundamental principles of this " 'Government' " (*p*).

But aliens in England have now the same right as subjects to hold real as well as personal property; the law of the United States is not as yet so liberal (*q*).

[The laws of the United States with respect to the *status* of aliens, and especially with respect to the right of alien individuals or Corporations to acquire and hold property within the Republic, have recently undergone some changes tending for the most part towards exclusion (*qq*).]

(*p*) *Wharton*, chap. i. ss. 3, 4. (Edition 1872.)

(*q*) *Wharton*, chap. iii. ss. 123 (*e*), 123 (*h*). The rights of aliens in this matter are mainly regulated by the local laws of each state.

[(*qq*) It may be taken as a general rule, throughout both "States" and "Territories," that aliens, who have not officially declared their intention of naturalizing themselves as American citizens, are exempt from serving on juries and in the militia, may not exercise the franchise, and cannot hold office; but in the matter of acquiring, holding, and disposing of *personal property*, are upon the same footing as citizens.

By the laws of some States a contract for services made with an alien previously to his entering the State, can only be enforced within that State during a limited time after his entrance. In Indiana such a contract appears to be void altogether.

CCCLXXXVI. *Thirdly*; it remains to consider the limitations to the doctrine which prevail both as to the

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A foreign or alien corporation is one constituted by or under the laws of a foreign country; but in some few States, and in all "Territories," if more than twenty per cent. of the stock of any corporation is held by aliens (in Wisconsin by non-resident aliens), such corporation is liable to the restrictions of alienage touching the ownership of land.

Unless carrying on insurance or banking business, and subject in certain States to restrictions regarding land, a foreign corporation, speaking generally, may conduct its business on the same footing as a domestic one.

In New York foreign corporations are prohibited from carrying on banking or discount business, but the prohibition does not extend to individual aliens. In Oregon certain conditions are imposed on all foreign banking corporations.

With regard to foreign companies carrying on insurance business there are special provisions in the laws of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New York, Wisconsin, Illinois, Minnesota, Iowa, Nebraska, Kansas, Colorado, and Oregon; Arkansas, Louisiana, and Alabama. In these States restrictions are commonly imposed on insurance companies whether domestic or foreign, but with somewhat greater stringency in the latter case. In California all companies, whether foreign or domestic, are subjected to various regulations. It seems that incorporation in that State confers an existence of only fifty years.

A company formed by resident aliens, but incorporated under Federal or State laws, is not deemed a foreign corporation; in some States, however, it is required that a majority of the directors shall be citizens.

There is considerable diversity between the laws of the several States touching the rights of aliens over *real property*. It appears that their present position is, briefly, as follows:—Aliens (not being enemies) may acquire, hold, and dispose of land, as if they were citizens, in seventeen States, viz. Maine, Massachusetts, Rhode Island, New Jersey, Pennsylvania (unless the land exceed 5,000 acres in extent or $20,000 per annum in value), Ohio, Michigan, Indiana, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Mississippi, Louisiana, Missouri, and Kansas.

To this list may be added Iowa, Kentucky, and Texas, except that in those States there are certain restrictions as to the right of an alien, or at least a non-resident alien, to take land by descent in case of intestacy. In Texas laws placing aliens under disabilities are projected.

Under the Code of Tennessee (sect. 2804), "An alien, resident

Foreign and English Law, as to the recognition of a foreign personal *status*.

or non-resident, may take and hold property, real or personal, in this State, either by purchase, descent, or devise, and dispose of and transmit the same by sale, descent, or devise, as a native citizen;" and an alien heir may, though not resident in the United States, take land by descent as if he were a citizen. But there is a special law of distribution of both real and personal property when a resident of Tennessee dies intestate and without issue, leaving alien nearest of kin (sect. 2807).

In Georgia, the French have the rights of Georgians; other aliens have those of citizens of the other States of the Federation.

The two Pacific States of Oregon and California impose restrictions only on the Chinese, or Mongolians.

In the twenty-four States above enumerated it appears that residence is not necessary to enable an alien to hold land; but it is required in Connecticut (unless the alien is French, or the land is used for mining or quarrying); in New Hampshire and Vermont (in which last-named State aliens are liable to a poll tax); and also, it seems, in Florida, Alabama, Arkansas, and Nevada.

In New York and Delaware an official declaration of intention to become a citizen is required, in addition to residence, and the intention must be carried out within a certain time.

The five States of Illinois, Wisconsin, Minnesota, Nebraska, and Colorado, have regulated this matter by Acts passed in 1887, all of which have a restrictive character.

In Illinois non-resident aliens and foreign corporations are incapable "of acquiring title to or taking or holding" any real estate in Illinois "by descent, devise, purchase, or otherwise;" but heirs of an alien, being themselves aliens and non-resident, are allowed three years to sell inherited land, which, if not so sold, escheats to the State. Resident aliens officially declaring their intention to become citizens may hold land, but must be naturalized within six years. Existing owners and mortgagees of land, being non-resident, are allowed, the former their lifetimes, the latter three years after possession, in which to sell. In default of sale the land escheats.

In Wisconsin non-resident aliens, foreign corporations, and corporations the stock of which is held by non-resident aliens to a greater extent than 20 per cent., are prohibited from holding more than 320 acres of land, "except such as may be acquired by devise, inheritance, or in good faith in the course of justice in the collection of debts heretofore created."

In Minnesota a similar law has been passed, save that the distinction between residence and non-residence is not made, and a declaration of intention to become citizens is required from individuals. A

CCCLXXXVII. And first, as to the limitations admitted even by the State, which applies the Personal Law of the domicil to the individual, wheresoever he may be.

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reservation is expressly made in favour of foreigners having *by treaty* a right to hold land in the United States.

In Colorado non-resident aliens may not acquire "agricultural, arid, or range lands" of an assessed total value of $5,000 or upwards. Such land acquired by devise or descent, or taken to realize a mortgage debt, must be sold within three years, or it is forfeited. Mining land, or land other than as above mentioned, is not subject to these restrictions.

In Nebraska non-resident aliens, who have not declared their intention of becoming citizens, and foreign corporations, are incapable of acquiring land in any way, except land necessary for the construction and operation of railroads. Land descending to an heir disqualified by the act, escheats at once to the State of Nebraska, which pays him compensation.

"*Residence*" sometimes relates to residence in the particular State, sometimes to residence within the Republic.

The District of Columbia and the "Territories" are subject to the following Act of Congress, approved on March 3, 1887.

"*An Act to restrict the Ownership of Real Estate in the Territories to American Citizens.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created: Provided that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer.

"Section 2. That no corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own

Savigny divides these limitations into two classes:—

1. Where the Law affecting the *status* belongs to that anomalous class of positive and absolute laws which are without the limits of the community of Law among independent States; and under this head he enumerates the following cases:

a. Where the Personal Law of the domicil permits polygamy.

β. Where it incapacitates on the ground of heresy.

γ. As to Ecclesiastical Corporations of foreigners—they would be subject to the restrictive Laws of the foreign State in which they acquire property: and, *vice versâ*, would not carry with them the restrictive laws of their domicil into a State which had no such laws.

δ. If the Law of a State declares Jews incapable of

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any real estate hereafter acquired in any of the Territories of the United States or in the District of Columbia.

"Section 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold, or own more than five thousand acres of land in any of the Territories of the United States; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by Act of Congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

"Section 4. That all property acquired, held, or owned in violation of the provisions of this Act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this Act, it shall be the duty of the Court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States, or of the parties concerned in any such proceeding arising out of the matters in this Act mentioned.

"Approved March 3, 1887."

F. J. Stimson's American Statute Law, Boston, 1886. *British Consular Reports on the Status of Aliens and Foreign Companies in the United States; Parliamentary papers (Commercial)*, No. 17, A.D. 1887, No. 6, A.D. 1888.]

acquiring immoveable property, it will affect foreign Jews who are not so incapacitated by the Law of their domicil.

In certain departments of France, Jews [were not allowed to buy up existing debts] except under some very severe restrictions.

This law would have affected foreign as well as native Jews (*r*).

The foregoing limitations of the General Law of Domicil are founded upon the fact that the Personal Law which is to be applied has a character of positive and rigorous obligation (*s*).

The following limitations are founded upon the peculiarity of a particular institution of a State which is not recognized by the general community of States.

α. Of this class is the incapacity of acquiring legal rights, attached to *civil death* by the Law of France and Russia. The State which has no such law would not recognize this Law of the domicil, Savigny says. And yet it would be difficult to distinguish this case from that of the incapacity of a monk to inherit, which Savigny seems to think would be enforced by a State which did not recognize monastic institutions.

β. Of this class, too, are the disabilities which belong to a state of slavery in a State which does not recognize this accursed condition.

CCCLXXXVIII.—2. The second class of limitations which Savigny applies to the general adoption of the Personal Law of the domicil, are derived from cases, which, inasmuch as they do not relate either to the capacity of being the passive subject of rights, or to the capacity of actively acquiring them, do not, properly speaking, affect

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(*r*) *Savigny, R. R.* viii. s. 365, A. § 5. See *Wächter, Die Collision, &c. Archiv*, Band XXV. p. 173.

Seuffert, Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten, B. i. N. 35, cited by Savigny *ubi sup.*

(*s*) "Eine streng positive und zwingende Natur."—*Savigny, ubi suprà.*

the application of the rule; or, in other words, are only apparent, and not real limitations of it. Such are—

1. Peculiar rights of a privileged class of nobility with respect to the acquisition of, or succession to, immoveable property.

The question whether or no a foreign nobleman shall be admitted to the privilege, has clearly no reference to general principles of Law at all; it is a question as to the Law on which that particular class of privileges is founded.

2. The same may be predicated of certain privileges (*t*) belonging to ecclesiastical establishments, and the public treasury (which is, of course, the national treasury only), when creditors in a case of bankruptcy. This is a matter belonging exclusively to the Laws of Bankruptcy (*u*).

3. With respect to the *restitution* of minors: this has lost its primitive character of a restraint on the capacity of acting; and, with reference to the application of the Law of domicil, is to be rather classed among the grounds of impugning a juridical act (*x*).

4. So with respect to the privilege which protects minors against all prescriptions under thirty years. This has no connexion with a restraint on the capacity of acting; it does not fall under the principle of applying the Law of the domicil, but under the rules which relate to prescription.

CCCLXXXIX. Such are the only limitations which Savigny admits to the universal recognition of the Personal Law of the Domicil.

The English and North Americans *e converso* admit the Personal Law of the domicil only as an exception to the universal recognition of the *lex loci actûs vel contractûs* (*y*).

(*t*) "Privilegien im Concurs."
(*u*) *Wächter, ubi sup.* pp. 179–182.
(*x*) *Ibid.* pp. 174, 179.
(*y*) *Story, Conflict of Laws*, ss. 102, 103.

CHAPTER XVIII.

MARRIAGE.

CCCXC. We have now arrived at the Second Branch of the General Subject of this Work; namely, the Legal Relations arising from Family (*a*).

The Legal Relations arising from Property affect the person through the medium of external circumstances, which are within the scope of individual option.

The Rights and Duties incident to Family accrue to persons in great measure arbitrarily, and without their choice.

CCCXCI. Under this title are to be considered :—

1. Marriage and Divorce.
2. Legitimacy.
3. Parental Authority.

In this chapter it is proposed to consider the Principles and Rules of Comity respecting Marriage.

CCCXCII. The Legal Relations arising from Marriage have, in all countries, been affected, not only by the principles of morality, which are universal, but by Religious and Political opinions, which are not universal; and, therefore, it would be natural to expect, on this subject, the intervention of many obstacles to the universal prevalence of those general rules which it is the great object of Comity, the handmaid of Civilization, to effect. On the

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(*a*) *Vide antè*, § xxx.

Lawrence, *Comm.* tome iii. p. 270, Mariage en pays étranger. *Wharton*, ch. iv.

other hand, the great importance of mutually maintaining and acknowledging these Legal Relations has approached so nearly to a necessity as to counteract, to some extent, the tendency to a discordant practice, which religion or politics might create.

CCCXCIII. These remarks apply with particular force to all questions connected with the validity of the Marriage Contract itself.

The question as to the validity of this, as of inferior contracts, involves two considerations:

1. The external formalities, or the outward form of the contract.

2. The capacity of the contractors.

CCCXCIV. (1) With respect to the outward form (*b*): just considerations of the immense importance attaching to the validity of that Contract which is the foundation of the State and the nursery of the Commonwealth (*c*) have induced all civilized nations to recognize universally the principle *locus regit actum*.

That the law of the place of celebration is binding as to the outward form is a *recepta sententia* of Private International Law.

(*b*) First among the Canonists on this subject is *Sanchez, de Matrimonio*, Lib. iii. Disp. 18, s. 10.

Among the numerous civilians of the seventeenth century the two Voets are chiefly referred to.

P. Voet, De Statutis et eorum Concursu, sect. ix. cap. ii.

J. Voet, Ad Pandectas, lib. xxiii. t. ii. s. 4.

For modern writers see—

Schäffner, S. Kap. ss. 99–103.

Pütter, ss. 36–43.

Wächter, Archiv für die Civ. Prax. Band xxv. pp. 184–188.

Savigny, R. R. viii. ss. 379, 381 § 6, 396.

Fœlix, tome ii. p. 361. Des mariages contractés en pays étranger. Extrait de la *Revue Etrangère et Française de Législation*, 1841, § 8, p. 106.

Story, Conflict of Laws, ss. 79-81, and ch. v.

(*c*) It is the parent, not the child, of civil society. "Principium urbis et quasi seminarium reipublicæ."—*Cic. De Off.* i. 17. Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 *Haggard's Consist. Reports*, p. 63.

CCCXCV. (2) With respect to the capacity of the persons contracting the *de facto* marriage.

Upon this important question there is a great and lamentable difference in the laws and judicial decisions of different States.

CCCXCVI. The Courts in England (*d*) have decided that a marriage valid between parties according to the *lex loci contractûs* is valid everywhere.

Did they mean thereby merely to affirm what has been already said—namely, that the form and the rites of the contract were to be governed by the *lex loci*? or did they mean to affirm that—though one or both of the parties to the contract might be incapable, by the Laws of his or her Domicil, by reason of minority, the absence of paternal consent, or for any other reason not of the character already mentioned as taking the case, on special grounds (*e*), out of the consideration of Comity—did they mean to affirm the validity of the marriage, even though the marriage has been contracted avowedly *in fraudem legis domesticæ*, by parties who have left their own country for the express purpose of evading its laws, and returned directly

(*d*) There are four classes of English statutes on the subject of Marriage:—

1. The General Marriage Statutes: 4 Geo. IV. c. 76; 49 & 50 Vic. c. 3; and c. 14.

2. The Statutes regulating the Marriages of Dissenters, or those which enable persons to marry without the aid of any religious rite: 6 & 7 Will. IV. c. 85; 19 & 20 Vic. c. 119; [23 & 24 Vic. c. 18; 35 & 36 Vic. c. 10. This last Act applies also to Ireland.]

3. The Statute declaring the invalidity of Marriages contracted within the prohibited degrees of affinity and consanguinity: (5 & 6 Will. IV. c. 54. [This applies also to Ireland.]

4. The Statute affecting the Marriages of the Royal Family, or of the descendants of King George the Second (12 Geo. III. c. 11).

[See also as to marriage of British subjects by a chaplain or consul in a foreign country, 4 Geo. IV. c. 91; 12 & 13 Vic. c. 68; 31 & 32 Vic. c. 61; as to Scotland, 19 and 20 Vic. c. 96; 41 & 42 Vic. c. 43; and as to Ireland, 7 & 8 Vic. c. 81; 33 & 34 Vic. c. 110; 34 & 35 Vic. c. 49.]

(*e*) *Vide antè*, §§ xxiv., xxv.

afterwards to it? Is, nevertheless, the marriage, once duly contracted according to the forms of the country in which it is celebrated, for ever after binding in England?

CCCXCVII. Certainly, ever since the decision of Lord Stowell in *Dalrymple* v. *Dalrymple* (*f*)—indeed, since the earlier decision of the Judges Delegate, in *Harford* v. *Morris* (*g*)—it has been the general opinion among lawyers in England and the United States of North America (*h*) that marriages contracted abroad by English domiciled subjects, like the Gretna Green or Scotch marriages, for the purpose of evading the English Law, were valid in England, if valid *lege loci contractûs*.

In the year 1857, Mr. Vice-Chancellor Stuart and Mr. Justice Cresswell decided that a marriage celebrated during a temporary residence in Denmark between an English widower and the sister of his deceased wife, being null by the statute 5 & 6 William IV. c. 54, was not valid, although valid by the Law of Denmark, the *lex loci contractûs*.

This decision did not necessarily affect the general question of the validity of marriages duly contracted abroad; because the case of an incestuous marriage fell under the category of exceptional cases (*i*), in which Comity did not require the adoption of the Foreign Law. But incidentally, and in the course of the judgment, it was denied that even where the case was not of this exceptional character, the Courts of England had ever laid down the doctrine that marriages celebrated abroad *in fraudem legis domesticæ* were valid, because valid *lege loci contractûs*. The validity of the Gretna Green or Scotch marriages was said to afford no proof to the contrary, because the English statute, which it was certainly the

(*f*) 2 *Haggard's Consist. Rep.* p. 59 (A.D. 1811). *Antè*, § xxv.
(*g*) 2 *Haggard's Consist. Rep.* p. 423 (A.D. 1776).
(*h*) *Story, Conflict of Laws*, ss. 123-124 a.
(*i*) *Vide antè*, §§ xiii, xviii.

object of the fugitives to evade, contained an express provision whereby Scotland was excluded from its operation; and Mr. Justice Cresswell said:—"I have, therefore, come "to the conclusion that a marriage, contracted by the "subjects of a country in which they are domiciled, in "another country, is not to be held valid, if, by contract-"ing it, the laws of their own country are violated" (*k*).

The decision of the other learned judge, Mr. Vice-Chancellor Stuart, was founded more entirely, if not altogether, upon the marriage in question being positively prohibited by the Law of England as *contra bonos mores*: but he agreed with Mr. Justice Cresswell in his remarks upon the Gretna Green or Scotch marriages.

CCCXCVIII. The case in which this judgment was delivered was carried by appeal to the ultimate tribunal of the House of Lords, and the judgment was generally affirmed (*l*).

CCCXCIX. The conclusion at which Mr. Justice Cresswell arrived as to the foreign marriage of English subjects might in one view be considered as of the utmost importance. The direct consequence of it might be to place the English Law in accordance with that of the Continent, and at variance with that of the United States of North America. It appears to adopt the sound principle of Private International Law as to Personal Statutes, or qualities impressed upon persons by the Law of their Domicil, namely: "Quando "lex in personam dirigitur, respicienda est ad leges illius "civitatis, quæ personam habet subjectam." It seems to bring the law on the Contract of Marriage in harmony with the law which governs every contract. "It was admitted" (Story (*m*) says, speaking of the contrary doctrine maintained by the Court of Massachusetts and by himself), "on that occasion by the Court, that the doctrine is re-

(*k*) *Brook* v. *Brook*, 3 *Smale & Giffard's Rep.* p. 481 (A.D. 1857).
(*l*) *Brook* v. *Brook*, 9 *H. L. Cases*, p. 193 (A.D. 1861).
(*m*) ss. 123 b.

" pugnant to the general principles of law relating to con-
" tracts: for a fraudulent evasion of, or fraud upon, the
" laws of the country where the parties have their domicil
" would not, except in the contract of marriage, be pro-
" tected under the general principle." It matures into a sound judgment the hint of the great jurist and judge, Lord Mansfield. " It has been laid down " (Lord Mansfield said) " at the bar, that a marriage in a foreign country " must be governed by the law of the country where the marriage was had; which in general is true. But the " marriages in Scotland of persons going from hence for " that purpose were instanced by way of example. They " may come under a very different consideration, accord-
" ing to the opinion of Huberus and other writers " (*n*). It brings the law upon marriage into harmony with some of the ablest decisions of English Judges, as to the legitimation of children born after marriage of domiciled Scotchmen and Englishmen, which will be presently considered more at length (*o*).

But in a subsequent case of *Simonin* v. *Mallac* (*p*), argued before the Court of Divorce, in the course of his argument the author of this work cited the judgment of Mr. Justice Cresswell in *Brook* v. *Brook*, as an authority for the position that the English Courts ought to hold invalid a marriage contracted in England, according to the English Law, but contrary to the French Law, by two French subjects domiciled in France.

The Judge Ordinary, Sir Cresswell Cresswell, however, repudiated this construction of the language; that language, he said, was to be construed *secundum subjectam*

(*n*) *Robinson* v. *Bland*, 2 *Burrow's Rep.* p. 1080.

(*o*) *Munro* v. *Munro*, 7 *Clark & Finnelly's Rep.* pp. 871-881, per Lord Cottenham.

In re Wright's Trusts, 3 *Kay & Johnson's Rep.* p. 419.

(*p*) 2 *Swabey & Tristram's Rep.* p. 67. *Vide infrà*, § ccccxxxv. A.

[See *Sottomayor* v. *De Barros*, *L. R.* 2 *P. D.* p. 81; 3 *P. D.* p. 1; 5 *P. D.* p. 94; *infrà*, § ccccxxxv. B.]

materiam, and did not go beyond the proposition that the Court of the domicil had a right to recognize incapacities affixed by the Law of the domicil as invalidating a contract entered into in another country between parties belonging to that domicil; and that nothing he had said affected in any way the proposition contended for—namely, that the Court of the place of the Contract of Marriage ought to recognize the incapacities affixed by the Law of the domicil on the parties to the contract; and this was the view taken by the House of Lords when the appeal from *Brook* v. *Brook* was before them.

CCCC. A singular case growing out of the Marriage Contract illustrates the difficulties which may arise on this subject between a Christian State and a heathen dependency.

It has been holden that the Supreme Court of Bombay *on its Ecclesiastical side* has no jurisdiction to entertain a suit respecting a Parsee marriage, as there existed such a difference between Parsees and Christians in respect of the duties and obligations of a matrimonial union, that the Court, if it made a decree, had no means of enforcing it, except according to the principles governing the Matrimonial Law in England, which were in such a case incompatible with the laws and customs of the Parsees (*q*).

CCCC.A. In the English Courts the subject of the *proof* requisite to establish the fact of a foreign marriage has been often considered (*qq*). The following among other positions have been laid down by them :—

A copy of the Register of a Foreign Marriage is not evidence to prove a Marriage (*r*).

In proof of a marriage in Chili, a document was tendered purporting to be an extract from a Register of Marriages, and signed by the Curate Rector of the parish where it was

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(*q*) *Ardaseer Cursetjee* v. *Perozeboye*, 10 *Moore's P. C. Rep.* p. 374.

[(*qq*) Cf. *Stephen's Digest of the Law of Evidence*, ch. v. Art. 53.]

(*r*) *Leader* v. *Barry*, 1 *Espinasse*, p. 353.

solemnized; his signature was verified by a public notary, whose signature was verified by other notaries, and their signatures were verified by the Foreign Minister of the Chilian Republic, and a certificate under the hand and seal of the British Consul at Chili was added. On the evidence of a witness that a Registry was kept by the Curate Rector of every church in Chili of marriages solemnized in it, and that a certificate of marriage such as that tendered was in the Chilian Courts received in evidence, that he knew the name of the Curate Rector, and was also well acquainted with several of the persons whose signatures were appended to the certificate as witnesses, the document was admitted as evidence of the marriage (*s*).

A certificate of a marriage in a foreign country, not purporting to be a copy of an entry in a Registry of marriages kept by the Law of that country, but only containing a reference to the Registry, cannot be received as evidence of the marriage, although it would be evidence of the marriage in the foreign Courts (*t*).

The certificate of a foreign ambassador under the seal of the Legation, is sufficient evidence of the Law of the country by which he is accredited (*u*).

In a suit for dissolution of marriage, it appeared that the petitioner and respondent lived together for five years in Virginia, and were received in society as man and wife; that by the law in force in Virginia, when the cohabitation began, no religious ceremony was necessary to the validity of a marriage, nor was any Registry of marriages required to be kept, and that, in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not be obtained. It was holden that there was sufficient proof of the marriage (*x*).

(*s*) *Abbott* v. *Abbott and Godoy*, 29 *Law Journal* (*Matr. Cases*), p. 57.

(*t*) *Finlay* v. *Finlay and Rudall*, 31 *Law Journal* (*Matr. Cases*), p. 149.

(*u*) *Klingemann, In goods of*, 32 *Law Journal* (*Prob.*), p. 16; 3 *Swabey & Trist. Rep.* p. 18.

(*x*) *Rooker* v. *Rooker and Newton*, 33 *Law Journal* (*Matr. Cases*),

CCCC.B. By recent legislation England permits her subjects to be married in certain cases before the Consul (*y*).

By 31 & 32 Vict. c. 61 (The Consular Marriage Act, 1868), s. 2, all marriages solemnized before the 16th July, 1868 (*both or one of the parties thereto being subjects or a subject of this realm*), by or in the presence of any person acting or purporting to act in the place of a British Consul, such Consul being duly authorized to solemnize and register marriages according to the provisions of the 12 & 13 Vict. c. 68, shall be as valid in law as if the same had been solemnized by or in the presence of such British Consul.

By s. 3, every person acting or legally authorized to act in the place of a British Consul, such consul being duly authorized to solemnize and register marriages between persons (both or one of them being a subject or subjects of this realm), shall be deemed to be a British Consul duly authorized for all the purposes of the 12 & 13 Vict. c. 68.

CCCCI. The Law in France, upon the foreign marriage of Frenchmen, may be briefly stated as follows:—

First,—By the 170th (*z*) article of the *Code Civil*, it is

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p. 42; 3 *Swabey & Trist. Rep.* p. 526. The identity of the parties may be proved by circumstantial evidence.—*Ibid.* [In *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, on appeal from the Supreme Court of Ceylon (*L. R.* 6 *App. Ca.* p. 364), will be found the authorities for the rule that from cohabitation as man and wife a marriage will be presumed, unless the contrary be shown. It was holden in the same case that, a certain form of marriage having been gone through between two Tamils in Ceylon, the *onus* of proving that all necessary ceremonies had been performed did not rest with those who claimed by virtue of the marriage, but that it rested with those, who wished on such grounds to impeach the marriage, to prove the contrary.]

(*y*) See vol. ii. § cclix.

(*z*) *Code Civil*, art. 170. "Le mariage contracté en pays étranger entre Français, et entre Français et étrangers, sera valable, s'il a été célébré dans les formes usitées dans le pays, pourvu qu'il ait été précédé des publications prescrites par l'art. 63, au titre *des Actes de l'état civil*, et que le Français n'ait point contrevenu aux dispositions contenues au chapitre précédent." (Cf. arts. 47, 48.)

enacted that, (1) "A marriage contracted abroad between "French subjects or between a French and a foreign sub- "ject, shall be valid, if celebrated according to the forms "in use in the country of its celebration—*provided*, (2) that "it has been preceded by the notices prescribed by the "63rd article in the title *des Actes de l'état civil*; and, *pro- "vided*, (3) that the Frenchman have not contravened the "regulations contained in the preceding chapter" (*a*).

With regard to the *forms*, as has been already said, France applies, like other nations, the rule *locus regit actum*.

It should, however, be mentioned here, that though a French Diplomatic Agent or Consul may lawfully marry two French subjects abroad, it has been holden in France that he cannot marry a French subject and a foreigner, because he has no authority or jurisdiction over the latter (*b*). But, with respect to the capacity of the contracting parties, it is clear, from the citation already made from the Code, that France does not agree with England upon this point; and this becomes more certain as we unravel the provisions of their 170th article.

CCCCII. Secondly,—By the 63rd [and 166th] articles (*c*)

(*a*) Liv. i. tit. v. Du Mariage, chap. i., arts. 144–164; see esp. 151.

(*b*) *Revue Etrangère*, tome viii. p. 435; *Fœlix*, tome ii. p. 364, Des Mariages contractés en pays étranger, ch. i. § 2, citing *Duranton, Cours de droit Français*, t. ii. Nos. 234, 235, Arrêt de la Cour de Cassation du 10 Août, 1819 (*Sirey*, 1819, I. 492). Jugement du tribunal de la Seine du 30 Décembre, 1837. (*Gazette des Tribunaux* du 31 Déc. 1837.)

(*c*) *Revue Etrangère*, tome viii. p. 435; *Fœlix, ubi sup.*

Code Civil, art. 63. "Avant la célébration du mariage, l'officier de l'état civil fera deux publications, à huit jours d'intervalle, un jour de dimanche, devant la porte de la maison commune. Ces publications, et l'acte qui en sera dressé, énonceront les prénoms, noms, professions et domiciles des futurs époux, leur qualité de majeurs ou de mineurs, et les prénoms, noms, professions et domiciles de leurs pères et mères. Cet acte énoncera, en outre, les jours, lieux et heures où les publications auront été faites : il sera inscrit sur un seul registre, qui sera coté et paraphé comme il est dit en l'art. 41, et déposé, à la fin

it is enacted, that the marriage must be preceded by two public notices (*publications*) [given, with an interval of eight days, before the town hall (*la maison commune, la municipalité*) of the place where each of the contracting parties is domiciled. If either party be, relatively to the marriage, subject to the control of others, the notice must be given at the town hall (*la municipalité*) of the domicil of such other persons (art. 168). The French subject who has preserved his French domicil, must cause these notices in France to precede his marriage in a Foreign State (art. 170); and within three months after his return to French territory, the record of his foreign marriage should be entered on the public marriage register of the place of his domicil (art. 171)].

CCCCIII. Thirdly,—Moreover, the parties must comply with the requisitions contained in the chapter on marriage, in the *Code Civil* (arts. 144–164). The husband must be of the age of eighteen, and the wife of fifteen; [they must have consented; be unmarried at the time; must not be within the prohibited degrees; and must have obtained, where necessary, the consent of their ascendants or of the family council (*conseil de famille*). If one only of the parties be French, the rules prescribed apply to such party alone.]

CCCCIV. The question, how far the absence of these public notices (*publications*), and the previous reference to ascendants (*actes respectueux*), affect the validity of a marriage celebrated abroad does not appear to have received an uniform judicial interpretation in France (*d*). But it does appear that the *Cour de Cassation*, on the 6th of March, 1837, and the *Cour Royale of Angers*, on the 12th of January, 1838, have decided (*dd*), (the second being only

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de chaque année, au greffe du tribunal de l'arrondissement." (Cf. arts. 94, 95, 166, 167, 168, 192, 193.)

[Art. 166. "Les deux publications ordonnées par l'article 63 . . . seront faites à la municipalité du lieu où chacune des parties contractantes aura son domicile." (Cf. arts. 74 and 102.)]

(*d*) *Revue Etrangère*, tome viii. p. 436. (*dd*) *Ibid.* p. 439.

a reproduction of the first), that a marriage wanting these preliminaries is absolutely void.

The *arrêt* of 1837 is here given in its own words:—

"Attendu que l'on ne peut pas interpréter l'article 170 "du Code Civil, sur les mariages contractés à l'étranger, "par les dispositions du même Code relatives aux mariages "célébrés en France: que, si ces derniers peuvent être "déclarés valables, lorsqu'il n'y a eu ni publications ni "actes respectueux, c'est parce que la loi trouve sa sanction "dans les peines qu'elle prononce contre les officiers de "l'état civil qui auraient procédé à la célébration; tandis "que, pour les mariages contractés à l'étranger, comme "les mêmes dispositions pénales ne pourraient atteindre "les officiers publics, la loi n'avait d'autre moyen de donner "une sanction à ses prescriptions, qu'en frappant le mariage "lui-même d'invalidité; que, s'il en était autrement, il "suffirait à des Français de passer à l'étranger pour "affranchir leur mariage de toutes les conditions imposées "par les lois Françaises, et pour, en s'abstenant des pu- "blications et des actes respectueux exigés, se soustraire, "soit aux oppositions des tiers, soit à l'autorité de la "puissance paternelle."

CCCCV. The high authority of M. Fœlix (*e*) is opposed to the soundness of this judgment; and his argument concerning the whole question—viz. the effect of the non-observance of the formalities prescribed by the French Law in nullifying a marriage contracted without these formalities in a foreign State, with a foreigner—appears irresistible; a question, it must be admitted, of no mean importance to the subjects of all other States, and especially to the near neighbours of France, among whom these marriages are most frequently contracted.

The reasoning of M. Fœlix is to this effect:—

The *arrêt*, above cited, declares that the non-observance of the prescribed preliminary formalities renders the marriage null and void, for two reasons: 1. That the French

(*e*) *Fœlix*, tome ii. pp. 375 et seq.

Law cannot punish the officers of another country, and therefore it can only mark its sense of the violation of Law by striking at the validity of the marriage—an argument which is not very satisfactory or convincing to foreigners. 2. That, otherwise, French subjects might evade the French Law as to marriage.

To the first reason he replies that the fact of its being impossible to inflict a fine or punishment upon the officer of a foreign State can never justify an entire alteration in the Law, and introduce a power, which would not otherwise exist, of nullifying a marriage; that such doctrine would lead to monstrous consequences; and that it is clear that the authors of the Code never intended that the marriage should be set aside whenever the officer of the State before whom it was contracted was the subject of and resident in another country.

The true exposition of the Law is, that if the non-observance of these particular preliminaries would not nullify the marriage of a Frenchman if contracted *at home*, they will not nullify it if contracted *abroad*.

The question, therefore, is, would the non-observance of the preliminaries—these *publications*, and *actes respectueux*—vitiate the marriage in France? The answer is in the negative, whether the *object*, the *letter*, or the *spirit* of the Law be considered.

The *object* of the 170th Article was to apply to French marriages, wheresoever celebrated, two fundamental principles of French Law:—

a. That the form of Acts or Contracts is governed by the Law of the place where they are entered into.

β. That the Laws which concern the state or capacity of persons,—*i.e.* Personal Statutes,—govern French subjects, even while resident in a foreign State (*f*).

(*f*) *Code Civil*, art. 3. "Les lois de police et de sûreté obligent tous ceux qui habitent le territoire." (Cf. art. 11, and Code d'Instruction, arts. 5, 6, 7.)

"Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française."

The *letter* or text of this Law employs very general terms. The reference to the 63rd Article, and to the first chapter of the Title on Marriage, only applies to French subjects abroad the Laws existing at home respecting Marriage.

If it had been intended to establish, in the 170th Article, an exception to the 3rd Article, it would have been expressed and not left to conjecture.

The particular words "provided that" (*pourvu que*), imply an indispensable condition (*condition irritante*); so the absence of these preliminaries necessarily nullifies the marriage.

But Merlin agrees with Fœlix in interpreting this language to mean only that *there are cases* in which this non-observance may influence the annulling of the Marriage, on the ground of *clandestinity*; and the Court of Appeal at Brussels decided to this effect, 28th July, 1828 (*g*).

As to the *spirit* of the Law: all legislators have recognized a distinction in the nature of the conditions required for the due solemnization of a marriage, some being deemed of an *essential*, some of a *precautionary* character. The Code establishes a complete system upon this subject. There is no reason for supposing that it meant to depart

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"Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger." (Cf. arts. 47, 48, 170, 2063.)

(*g*) *Merlin, Rép.*; Bans de Mariage, II.

Merlin, Questions de Droit; Publication des Mariages.

"Les conditions que cet article impose au moyen des mots *pourvu que*, sont aussi relatives et s'appliquent aussi à la contravention aux dispositions que renferme le chapitre I., sous lequel se trouvent non-seulement des dispositions dont l'inobservation entraîne la nullité absolue et irréparable du mariage, mais aussi des dispositions dont l'inobservation peut non-seulement se réparer, mais vient même à disparaître par le seul laps de temps; que, par conséquent, on ne peut induire du contenu littéral de l'article 170, que toute contravention indistinctement à l'une des dispositions du chapitre I. emporte nécessairement et *per se* une nullité absolue. . . ."—*Revue Etrang.* tome viii. pp. 440-41. *Fœlix*, tome ii. p. 370.

from that system in the case of marriages contracted *abroad.*

CCCCVI. Adopting, then, the sound and well-reasoned opinion of M. Fœlix, that the non-observance of those preliminaries only which nullifies a marriage contracted in France, nullifies it when contracted abroad, the very important question remains, What are these?

The question may be answered generally and specifically. Generally it may be said, in the language of the *Cour Impériale* of Paris, which tried, in 1856, the case of M. Lefebvre, that no defect of these publications will invalidate a foreign marriage, unless this defect be surrounded and further contaminated by a real clandestinity (*entouré, entaché, d'une véritable clandestinité*) (*h*).

(*h*) The case is reported, *Gazette des Tribunaux*, 2 Mars, 1856. The judgment was as follows :—

"Attendu, en fait, que les père et mère de Lefebvre ont connu son mariage et qu'ils y ont consenti ;

"Qu'ils l'ont ratifié depuis son accomplissement ; que cette ratification résulte :

"Premièrement. D'actes, déclarations, expressions de volonté maintes fois réitérées et impliquant le consentement le plus formel ;

"Deuxièmement. De ce qu'ayant connu le mariage, ils sont demeurés plus d'un an sans l'attaquer et ne l'attaquent même pas aujourd'hui ;

"Que Lefebvre lui-même est demeuré plus d'un an sans attaquer son mariage depuis l'époque où il a été contracté, époque à laquelle il avait déjà l'âge compétent pour consentir lui-même son mariage ;

"Attendu qu'aux termes de l'article 183 du Code Napoléon, les faits ci-dessus énoncés créent contre Lefebvre, comme ils créeraient contre ses père et mère eux-mêmes, une fin de non-recevoir ;

"Attendu qu'il résulte du texte et de l'esprit de la loi que le défaut de publications avant le mariage contracté à l'étranger n'est pas, à lui seul, une cause de nullité de mariage ;

"Que le défaut de publications ne peut contribuer à faire prononcer la nullité d'un mariage que lorsque ce mariage a été entaché d'une véritable clandestinité ;

"Attendu que le mariage des époux Lefebvre, loin d'avoir été contracté clandestinement, a été entouré de toute la publicité nécessaire ;

"Que ce serait à Lefebvre, demandeur, de prouver la clandestinité ; qu'il ne rapporte aucune preuve ni justification à cet égard ;

CCCCVII. To answer the question specifically it should be observed—

First, a marriage contracted by a French subject abroad may be impeached in the terms of the 191st Article (*h*) on the ground that it has not been *publicly* contracted (*contracté publiquement*).

The text of this article not expressly pronouncing that the marriage is null, because the 63rd, 166th, and 167th articles have been contravened, leaves a large latitude to the discretion of the Judge, to consider whether there has been the requisite *publicity* or not; and the absence of the *publications* and *actes respectueux* may or may not be adminicular to the proof of non-publicity or *clandestinity*.

They are not, however, necessarily so; and the French Tribunals have held that these formalities have been enacted by the 191st article, in order to prevent an infringement of the fundamental provisions of the above-mentioned

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"Que la publicité résulte des formes mêmes dans lesquelles le mariage a été célébré;

"Qu'elle résulte, en outre, des toutes les circonstances qui ont précédé et accompagné ce mariage;

"Déclare Lefebvre mal fondé en sa demande, l'en déboute, et le condamne aux dépens."

M. Lefebvre est appellant de ce jugement.

I have not learnt whether the appeal was prosecuted, or what was the result.

In the case of the succession of *M. J. P. Pescatore* (July, 1856), the Civil Tribunal of the Seine declared itself divided, and therefore expressed no opinion on the validity of a marriage of French persons in Spain, which the next of kin of the husband applied to set aside as clandestine and void under the French Law, and void, also, by the Law of Spain, the priest who officiated being neither the Parochus of the parties, nor duly authorized under the Decree of the Council of Trent.

(*h*) Art. 191. "Tout mariage qui n'a point été contracté publiquement, et qui n'a point été célébré devant l'officier public compétent, peut être attaqué par les époux eux-mêmes, par les père et mère, par les ascendans, et par tous ceux qui y ont un intérêt né et actuel, ainsi que par le ministère public." (Cf. Arts. 75, 165, 170; and *Tarif des frais en matière criminelle*, art. 121.)

first chapter; and that where the Court is of opinion that these have not been infringed, the marriage, in spite of the absence of the *publications*, will be pronounced *valid* (*i*).

On the other hand, where it is proved that the marriage was contracted abroad *in order* to escape from the prohibitions of the French Law—where, in fact, it was intentionally clandestine—it will be pronounced *invalid* (*j*).

Secondly. The marriage of a Frenchman under 25, and of a Frenchwoman under 21 years of age, may be annulled, under the terms of the article 182 (*k*). But it has been holden, that the absence of the *actes respectueux*, prescribed in articles 151, 152, 153 (*l*), does not generate a nullity (*m*).

Thirdly (*n*). Marriages contracted abroad, within the French prohibited degrees, are invalid in France.

(*i*) *Rev. Etrang.*; and *Fœlix, ubi sup.* Arrêt de la Cour d'Appel de Bruxelles, 18 Juin, 1828, *Table générale*; v. *Mariage*, No. 6. *Simonin* v. *Mallac*, 2 *Swabey & Trist. Rep.* p. 67. *Vide post*, § ccccxxxv.A.

(*j*) Arrêt de la Cour de Cassation, 12 Février, 1833, et 6 Mars, 1837.

(*k*) Art. 182. "Le mariage contracté sans le consentement des père et mère, des ascendans, ou du conseil de famille, dans les cas où ce consentement était nécessaire, ne peut être attaqué que par ceux dont le consentement était requis, ou par celui des deux époux qui avait besoin de ce consentement." (Cf. arts. 148, 183, 201, 202.)

(*l*) Art. 151. "Les enfans de famille ayant atteint la majorité fixée par l'art. 148 sont tenus, avant de contracter mariage, de demander, par un acte respectueux et formel, le conseil de leur père et de leur mère, ou celui de leurs aïeuls et aïeules, lorsque leur père et leur mère sont décédés, ou dans l'impossibilité de manifester leur volonté." (Cf. arts. 157, 158, 182, 502.)

Art. 152. "Depuis la majorité fixée par l'art. 148, jusqu'à l'âge de trente ans accomplis pour les fils, et jusqu'à l'âge de vingt-cinq ans accomplis pour les filles, l'acte respectueux prescrit par l'article précédent, et sur lequel il n'y aura pas de consentement au mariage, sera renouvelé deux autres fois, de mois en mois; et un mois après le troisième acte, il pourra être passé outre à la célébration du mariage." (Cf. arts. 157, 158, 170, 182.)

Art. 153. "Après l'âge de trente ans, il pourra être, à défaut de consentement sur un acte respectueux, passé outre, un mois après, à la célébration du mariage."

(*m*) *Rev. Etrang. ibid.* p. 444. *Fœlix*, tome ii. pp. 374-5.

(*n*) *Rev. Etrang. ibid.* p. 442. *Fœlix, ibid.* p. 372.

CCCCVIII. If the validity of a marriage contracted abroad be impeached in France, the defendant is entitled to plead the same defence as if it had been contracted in France, and to invoke for this purpose the 183rd, 185th, [and 196th] (*o*) articles of the Code (*p*).

(*o*) Art. 183. "L'action en nullité ne peut plus être intentée ni par les époux, ni par les parens dont le consentement était requis, toutes les fois que le mariage a été approuvé expressément ou tacitement par ceux dont le consentement était nécessaire, ou lorsqu'il s'est écoulé une année sans réclamation de leur part, depuis qu'ils ont eu connaissance du mariage. Elle ne peut être intentée non plus par l'époux, lorsqu'il s'est écoulé une année sans réclamation de sa part, depuis qu'il a atteint l'âge compétent pour consentir par lui-même au mariage."

Art. 185. "Néanmoins le mariage contracté par des époux qui n'avaient point encore l'âge requis, ou dont l'un des deux n'avait point atteint cet âge, ne peut plus être attaqué, 1° lorsqu'il s'est écoulé six mois depuis que cet époux ou les époux ont atteint l'âge compétent; 2° lorsque la femme qui n'avait point cet âge a conçu avant l'échéance de six mois."

[Art. 196. "Lorsqu'il y a possession d'état, et que l'acte de célébration du mariage devant l'officier de l'état civil est représenté, les époux sont respectivement non recevables à demander la nullité de cet acte."]

[(*p*) The following case of a marriage contracted abroad by a Frenchman deals with four points:—1. the *actes respectueux*; 2. the *publications*; 3, the form of the contracts; 4, the personal statutes governing the parties. It was decided in August, 1884, by the Civil Tribunal of Pontoise.

Mons. R., a Frenchman, who in 1854 had married, before a priest at New Orleans, a Louisianan coloured woman, prayed the Court to declare his marriage null, because:—

1st. He had not obtained the consents (being, in 1854, only 24 years of age), nor given the notices required by the French law.

As to this point, which was little relied upon, the Court held that the default of consents had been long ago cured by time, and that omission of notices could not be set up, since there was nothing clandestine in the marriage.

2ndly. The priest before celebrating the marriage did not obtain permission from the proper civil officer, as directed by the Louisianan law.

This was held to be an omission of a formal nature, met by art. 196 of the French *Code Civil*, and not to invalidate the marriage:—

"Attendu que l'absence de cette permission peut violer l'acte, mais non le mariage, et constitue une de ces violations de forme que l'article 196 a eu précisément pour but de couvrir;

"Attendu que la fin de non-recevoir établie par l'article 196 est fondée sur cette présomption que les parties qui, pendant de longues années, ont vécu avec la possession d'état d'époux légitimes sont censés avoir renoncé à se prévaloir des simples nullités de forme qui pourraient entacher l'acte de leur mariage ;

"Attendu que cette présomption a la même valeur, soit que les formes matérielles de l'acte aient été prescrites par la loi française, soit qu'elles l'aient été par la loi étrangère, l'article 170 déclarant valable le mariage contracté entre Français et étrangers, s'il a été célébré dans les formes usitées dans le pays où il a été contracté."

3rdly. The 95th Article of the Code of Louisiana, in 1854, before the abolition of slavery, forbade and declared null the marriage of a white with a coloured person, whether a slave or free.

It was held that this incapacity, being impressed by a foreign law on one of the parties alone, whilst the other party retained the personal status given him by French law, could not be upheld in France.

"Attendu que l'article 95 crée un empêchement relatif, et non absolu, puisque la femme de couleur peut d'une manière générale se marier, mais ne peut pas épouser un blanc ;

"Attendu que les empêchements de cette nature ne sauraient exister qu'autant que l'incapacité relative de l'époux déclaré incapable rencontre dans l'autre époux cette même incapacité ;

"Attendu, en effet, que cette nullité de mariage se compose de deux éléments et de la comparaison de ces deux éléments entre eux, et que la femme de couleur n'est incapable d'épouser le blanc que parce que le blanc lui-même est frappé de l'incapacité d'épouser une femme de couleur ;

"Attendu que si, dans l'union contractée en 1854, l'un de ces éléments de nullité résidait en la personne de la demoiselle Aline S——, cet élément faisait absolument défaut dans la personne de R——, qui tient de la loi française le droit incontestable d'épouser une femme de couleur ;

"Attendu qu'à ce point de vue, les deux éléments de la nullité prévue par l'article 95 ne coexistant pas, et l'une des conditions de cette nullité, celle de l'incapacité réciproque, faisant défaut, il serait inexact de dire que l'union de 1854 est atteinte d'un vice radical de nullité ;

"Attendu que, s'il est vrai que les lois locales régissent les actes faits en pays étranger, ce principe n'est vrai que pour la forme même des actes, et cesse d'être applicable lorsqu'il s'agit des statuts personnels qui, aux termes de l'article 3 du Code civil, régissent la capacité des personnes, cette capacité restant toujours soumise à la législation particulière qui régit les nationaux, et qu'il y aurait alors lieu de rechercher, en cas de contradiction des statuts personnels, quel est celui qui doit être appliqué ;

"Attendu qu'en admettant, contrairement à ce qui a été ci-dessus établi, que les deux statuts personnels de R—— et d'Aline S——

Although by article 171 (*q*), a French marriage abroad ought to be transcribed on the public Registry of Marriages, in the place of the domicil of the French husband, three months after his return home, yet no penalty is attached to the omission; and before the registration, both parties may claim the civil rights of marriage (*r*).

[CCCCVIII.A. The question of mixed marriages in the United Kingdom between British and French subjects now stands upon a different footing by virtue of an agreement, entered into, in 1884, between the two Governments, providing for certificates to be issued by French consuls in case of such marriages. (See *infrà*, Appendix II.)]

CCCCIX. France possesses no written law in the *Code Civil*, or elsewhere, as to marriages contracted *in France* between foreigners, or between French subjects and foreigners (*s*); the question is therefore subjected to the general principles of French jurisprudence.

These marriages, therefore, as to *form*, depend upon the French Laws already cited: *locus regit actum* is the principle applied to them.

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fussent en contradiction, et que dans ce conflit des statuts personnels qui régissent la capacité des personnes relativement au mariage, il y ait lieu de choisir, les Tribunaux français, dont toute la législation est favorable à la validité des mariages, devraient, en présence de l'impossibilité d'appliquer à la fois le statut personnel de l'étranger qui prohibe le mariage, et le statut personnel du Français qui le permet, se décider pour la validité plutôt que pour la nullité;

"Attendu que cette solution s'imposerait d'autant plus aux juges français que l'application du statut personnel de l'étranger ne saurait être faite, lorsque ce statut personnel viole l'ordre public établi en France."

In conclusion, the petition was dismissed with costs. (*Gazette des Tribunaux*, Nov. 1, 1884. The editors are indebted for a report of this case to M. Clunet.)]

(*q*) Art. 171. "Dans les trois mois après le retour du Français sur le territoire de la République, l'acte de célébration du mariage contracté en pays étranger sera transcrit sur le registre public des mariages du lieu de son domicile." (Cf. arts. 40, 102.)

(*r*) *Rev. Étrang. ibid.* pp. 446-7; *Fœlix*, tome ii. pp. 377-8.

(*s*) *Ibid.* pp. 448-457; *Fœlix*, *ibid.* pp. 380-390.

These marriages, as to all that concerns their *substance* and their intrinsic validity, depend upon the Law of the foreigner's domicil. All that relates to the *status* and *capacity* of the foreigner to contract, is governed by this Law. *Statutum personale sequitur personam* (*t*) is the principle applied to these cases.

CCCCX. Thus, the marriage of a subject of Würtemberg, by the Law of which State a subject was incapable of marrying before his twenty-fifth year is completed, would have been held invalid if contracted before that period, though contracted in France, which permits, as has been said, marriage at the age of eighteen or fifteen years.

CCCCXI. Again, by a Law of Bavaria (12th July, 1818) and of Würtemberg (4th September 1818), the subjects of these kingdoms were forbidden to marry abroad, without the permission of their respective governments.

A marriage by such subjects in France, without such permission, would have been pronounced null and void in that country.

CCCCXII. The French subject, therefore, who marries a foreigner, in France, is exposed to the great risk of having his marriage annulled, on account of the provisions of a foreign law, of which he is wholly ignorant.

The French authorities appear to have vainly endeavoured to remedy this evil,—first, by requiring every foreigner, *non naturalisé*, to produce a certificate from the legal authorities of his domicil, as to the absence of any legal impediments to his proposed marriage (*u*).

(*t*) The English lawyers were in the habit of supposing and enunciating that the English and Foreign Laws are agreed as to the doctrine "*mobilia sequuntur personam*" (*Bremer* v. *Freeman*, 10 *Moore P. C. Rep.* 361); but they did not know, or forgot, that the foreign lawyers held also, and conjointly with it, the doctrine "*statutum personale sequitur personam.*" The word "*persona*," therefore, conveyed to the English and the foreign lawyer a very different meaning.

(*u*) "Dans plusieurs états limitrophes ou voisins de la France, la loi défend aux régnicoles de se marier en pays étranger sans l'autorisation du gouvernement, sous peine de la nullité de leur mariage. Il résulte

This scheme was thwarted, sometimes, by there being no officer at his domicil qualified to give such a certificate; for it seems, whimsically enough, never to have occurred to the French authorities that an analogous officer to the French *Maire* might not exist in other countries.

Sometimes, the officer of the domicil refused to comply with the requisition.

This state of things was attempted to be remedied by a very strange regulation (*x*). An *acte de notoriété* was introduced in the form prescribed by the 70th article of the *Code Civil* (*y*), being afterwards ratified or subjected to *homologation* according to this 71st article (*z*).

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de là que les habitants de ces pays, attirés en France par l'activité de l'industrie ou par la richesse du sol, y ont épousé des Françaises sans avoir obtenu cette autorisation. S'ils veulent ensuite retourner dans leur patrie, leurs femmes et leurs enfants s'en voient repoussés comme illégitimes. Un tel état de choses impose au gouvernement français le devoir de recourir à quelques précautions propres à assurer la validité de ces mariages contractés de bonne foi par des femmes qui, après l'accomplissement de toutes les formalités requises par les lois françaises, ont dû compter sur la protection de ces lois. Le moyen le plus efficace me paraît être d'exiger de tout étranger, non naturalisé, qui voudra désormais se marier en France, la justification, par un certificat des autorités du lieu de sa naissance ou de son dernier domicile dans sa patrie, qu'il est apte, d'après les lois qui la régissent, à contracter mariage avec la personne qu'il se propose d'épouser. En cas de contestation, les tribunaux compétents seront appelés à statuer." *Rev. Étrang.* tome viii. pp. 449, 450. *Fœlix*, tome ii. pp. 381–2.

(*x*) "S'il y avait impossibilité d'obtenir le certificat d'aptitude prescrit par les instructions, parce que l'autorité du lieu de la naissance ou du dernier domicile du futur époux en pays étranger refuserait de délivrer une attestation de cette nature, on pourrait y suppléer par un acte de notoriété sous la forme indiquée dans l'article 70 du Code Civil. Cet acte devrait être soumis à l'homologation prévue par l'article 72, s'il contenait en même temps l'attestation de l'impossibilité où la future se trouverait de se procurer son acte de naissance."—*Ib.* pp. 451, 452.

(*y*) Art. 70. "L'officier de l'état civil se fera remettre l'acte de naissance de chacun des futurs époux. Celui des époux qui serait dans l'impossibilité de se le procurer pourra le suppléer, en rapportant un acte de notoriété délivré par le juge de paix du lieu de sa naissance, ou par celui de son domicile."

(*z*) Art. 71. "L'acte de notoriété contiendra la déclaration faite

This led to grievous abuses, and was intrinsically absurd; for the *acte* was satisfied by the appearance of seven individuals, taken from any class, swearing that the foreigner had applied in vain to the authorities of his domicil for the proper certificate.

M. Fœlix is of opinion that these attempts, though they have rendered *de facto* marriages of foreigners in France a matter of great facility, have by no means contributed to strengthen the validity of the marriage bond.

Marriages contracted on the faith of these *jugements d'homologation* are frequently only phantoms of a real marriage (*simulacres de mariage*). For instance, when the Laws of the foreigner's domicil enact nullities unknown to the French law; when the *acte de notoriété* is silent as to nullities recognized by the French Code, such as the prohibited degrees; or when the *acte* announces the fact of there being no consent on the part of the parents.

At all events, M. Fœlix thinks that foreign countries which hold that Personal Laws follow the person into a foreign land, will not consider that these nullities are cured by judgments of homologation (*a*).

CCCCXIII. The law respecting the marriage of

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par sept témoins, de l'un ou de l'autre sexe, parents ou non parents, des prénoms, nom, profession et domicile du futur époux, et de ceux de ses père et mère, s'ils sont connus; le lieu, et, autant que possible, l'époque de sa naissance et les causes qui empêchent d'en rapporter l'acte. Les témoins signeront l'acte de notoriété avec le juge de paix; et s'il en est qui ne puissent ou ne sachent signer, il en sera fait mention."

(*a*) "Le certificat exigé par la circulaire du 4 Mars 1831 est sans objet à l'égard des sujets du roi de Sardaigne, suivant la législation qui les régit." M. le garde des sceaux ajoute que "les mariages des Sardes, pour être valables, doivent être autorisés par le droit canonique, et de plus célébrés dans toutes les formalités du culte qu'ils professent; mais que, comme la loi française ne permet pas que le mariage religieux précède le mariage civil, il suffira désormais, à l'égard des sujets Sardes qui désireraient se marier, de constater leur capacité légale d'après le droit canonique, et de prévenir en outre les futurs des conditions requises par la législation étrangère."—*Rev. Étrang.* tome viii. pp. 455, 456. *Fœlix*, tome ii. p. 328.

foreigners in the United States of North America, and France, and the wide difference between the jurisprudence of the two countries upon this point, have been mentioned.

The former, it has been seen, disregards the disabilities, with certain exceptions, imposed by the Personal Law of the Domicil, and looks only to the *lex loci contractûs*. The latter considers these disabilities as incapacitating the subject of them from marrying anywhere, and invalidates the *de facto* marriage which has been celebrated in defiance of them.

CCCCXIV. It may be well to remark here that the Law on Marriage generally admits, with respect to countries, of a division into two classes :—

1. Those countries in Europe and elsewhere, which have adopted, upon this point, the principles of the French Code, either literally or in the main.

2. Those which have derived their jurisprudence in this matter from a wholly different source.

CCCCXV. In the former class are or were Belgium, the Provinces on the Left Bank of the Rhine, the Duchy of Berg, the Kingdom of the Netherlands, the Grand Duchy of Baden, the Kingdom of the Two Sicilies, and now the Kingdom of Italy.

The second class comprises the other countries of Europe.

CCCCXVI. With respect to the particular question which is now under discussion, namely, by what laws the marriage of foreigners, or of subjects elsewhere than in the place of their Domicil, is governed? it is to be further remarked—

That, with respect to both these points, the countries which had been incorporated into and were detached from France (*pays détachés*), in 1814, 1815, have adopted the rules of the *Code Civil* which have been already mentioned.

[§§ CCCCXVII. to CCCCXXXII., both inclusive, contained an elaborate and detailed account of the marriage laws of most of the Continental States of Europe. Since the

date, however, when this was written, great changes have been introduced into the laws of these States, and there is no doubt that much of this information is now out of date and would be misleading. It has been therefore thought best to omit it altogether. The English, French, and Italian laws supply sufficient material for the discussion and application of questions of principle. As to Germany it is understood that a general Civil Code for the whole Empire is now in course of preparation.

CCCCXXXII.A. The Italian Code follows the French with regard to the marriages of Italian citizens in a foreign country. It requires a foreigner wishing to marry in Italy to produce evidence that the laws of his own country offer no obstacle to the contemplated marriage (*u*).]

MARRIAGE—GENERAL REMARKS ON VALIDITY OF.

CCCCXXXIII. The investigation which has been pursued into the Codes and Common Law of some of the principal Christian States, leads us to the conclusion that the following maxims of jurisprudence prevail upon the matter of the validity of the marriage of subjects abroad:—

1. The broad principle maintained by the United States of North America—namely, that the *capacity* of the parties, as well as the *formalities* of the contract, are to be decided *lege loci contractûs*, and not *lege domicilii*.

2. The principle maintained by France, and generally

[(*u*) Art. 100. "Il matrimonio seguito in paese estero tra cittadini, o tra un cittadino ed uno straniero, è valido, purchè sia celebrato secondo le forme stabilite in quel paese (9 Disposizioni prelim.), e il cittadino non abbia contravvenuto alle disposizioni contenute nella sezione ii. del Capo I. di questo Titolo. Le publicazioni devono anche farsi nel regno a norma degli art. 70 e 71. Se lo sposo cittadino non ha residenza nel regno, le pubblicazioni si faranno nel comune del ultimo domicilio."

101. "Il cittadino che ha contratto matrimonio in paese estero, deve, nei tre mesi del suo ritorno nel regno, farlo inscrivere nel registro dello stato civile del comune dove avrà fissata la sua residenza, sotto pena di una multa estendibile a lire cento."]

by the States of the European Continent, namely, that the *capacity* of the parties is to be determined by the law of their own State, and that a marriage valid *lege loci contractûs* may be holden invalid *lege domicilii* on account of the want of capacity, though it be duly celebrated according to the formalities *legis loci contractûs* (*x*).

3. The principle adopted by States which recognize the *lex loci contractûs* as binding in all cases but those *in fraudem legis domesticæ*.

CCCCXXXIV. Story (*y*) dwells emphatically upon the probable evil resulting from the French Law. "It will "be no matter of surprise," he says, "if hereafter we shall "find a Frenchman with two lawful wives—one, according "to the Law of the place of the marriage, and the other "according to that of his Domicil of Origin" (*z*). He might have extended his remarks to Austrian, Prussian, and, perhaps, in some respects, to English Law.

But Fœlix (*a*) maintains as stoutly that the French Law

[(*x*) See the Italian Code, art. 102. "La capacità dello straniero a contrarre matrimonio è determinata dalle leggi del paese a cui appartiene. Anche lo straniero però è soggetto agli impedimenti stabiliti nella Sez. ii. del Capo I. di questo Titolo."]

(*y*) *Conflict of Laws*, s. 124.

(*z*) Continental nations of Europe allow a much greater extent and force to the *parental* power (their ideas of which were mainly derived from the Roman law) than Great Britain or the United States of America.—*Story, ibid.* s. 90.

(*a*) § 88. *Pothier* says, "Tout ce que nous avons dit jusqu'à présent sur la nullité du mariage célébré hors de la présence et sans le consentement du Curé des parties, a lieu, quand même le mariage auroit été célébré en pays étranger par des François, lorsqu'il paroît que c'est en fraude de la loi qu'ils y sont allés. En vain diroient-ils que la forme des contrats se règle par les lois du lieu où ils se passent; que leur mariage ne s'étant pas fait en France, mais en pays étranger, ils n'ont pas été obligés d'observer les lois prescrites en France pour la forme de leur mariage. La réponse est, que la célébration du mariage en face d'Église par le propre Curé, n'est pas une pure forme d'acte; c'est une obligation que nos lois imposent aux parties qui veulent contracter mariage, à laquelle les parties qui y sont sujettes, ne peuvent se soustraire, en allant en fraude se marier dans un pays étranger.

on this point is in conformity with the principles of International Law, as Mr. Justice Story can support the opposite conclusion.

CCCCXXXV. Moreover, if England does, as Story supposes, maintain the Law of the place of contract when it contravenes the personal Law of the domicil, it must be admitted that she would not be consistent in her administration of the Law upon this all-important subject of Foreign Marriage.

The *Marriage* of the Englishman in Scotland, contracted avowedly *in fraudem legis*, she holds good: but the *Divorce* of English persons pronounced in the same country, she not only holds bad, but subjects the parties, if the divorce be of an English Marriage contracted by domiciled English persons, and the parties marry again on the faith of the legal divorce, to criminal punishment (*b*), and bastardizes their issue; while in another part of the same kingdom the marriage is good, and the children are legitimate.

CCCCXXXV.A. In *Simonin* v. *Mallac* the facts were as follows:—

C. and D., being native subjects of France, and then domiciled in that country, came over to London in June 1854, and were married by license according to the Law of England, but without the observance of certain formalities and consents required by the Law of France in respect of the marriage of its own subjects in foreign countries. C. and D. returned to France, when D., the man, refused to

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"Il en seroit autrement d'un mariage qu'un Français qui se trouveroit avoir, sans fraude, sa résidence dans un pays étranger, où il n'y a pas d'exercice de la Religion Catholique, auroit contracté avec une femme Catholique, et qui auroit été célébré dans la Chapelle d'un Ambassadeur Catholique par l'Aumônier; ce mariage seroit valable, n'y ayant pas en ce cas de fraude, et le mariage n'ayant pu être célébré autrement."—*Pothier, Traité du Contrat de Mariage*, tom. iii. pt. iv. c. i. Sect. III. Art. 2, § 2.

(*b*) *Lolley's case*, 1 *Russ. & Ry. C. C. Rep.* p. 237. *Vide infrà*, § dxiv. [See *Harvey* v. *Farnie*, *L. R.* 8 *App. Ca.* p. 43.]

celebrate the marriage according to the French Law, and C. instituted a suit for nullity in the French Courts, which D. did not defend, and in December 1854 C. obtained a decree of nullity. C. subsequently came to reside in England, and petitioned for a decree of nullity in this Court; personal service of the citation was effected on D. in Naples, who did not appear.

It was holden (by Sir C. Cresswell, Baron Channell, and Mr. Justice Keating, constituting the full Court for Divorce and Matrimonial Causes), first, that D., having entered into a contract in this country, was subject to the jurisdiction of the Courts of this country in respect of the personal *status* resulting from such contract; secondly, that the personal *status* resulting from such contract is to be ascertained by the Law of this country, in which the contract was made, and not by any special Law of the country of the domicil of the parties to the contract (*c*).

The Judge Ordinary, Sir C. Cresswell, delivering the judgment of the full Court, observed:—

"The French Tribunal in this case appears to have "held the marriage null and void, not because it was "absolutely prohibited by the Law of France, but because "the parties contracted it in England with the formal "intention of evading the prescriptions of the French Law.

"Every nation has a right to impose on its own sub-"jects restrictions and prohibitions as to entering into "Marriage Contracts, either within or without its own "territories; and if its subjects sustain hardships in con-"sequence of those restrictions, their own nation only "must bear the blame; but what right has one independent "nation to call upon any other nation equally independent "to surrender its own laws in order to give effect to such "restrictions and prohibitions? If there be any such "right, it must be found in the Law of nations, that law

(*c*) *Simonin* (f. c. *Mallac*) v. *Mallac*, 2 *Swabey & Tristram*, p. 67 (A.D. 1860).

" ' to which all nations have consented, or to which they
" ' must be presumed to consent, for the common benefit
" ' and advantage:' Which would be for the common
" benefit and advantage in such cases as the present, the
" observance of the Law of the country where the marriage
" is celebrated, or of a foreign country? Parties con-
" tracting in any country are to be assumed to know, or
" to take the responsibility of not knowing, the Law of
" that country. Now, the Law of France is equally
" stringent whether both parties are French, or one only.
" Assume, then, that a French subject comes to England,
" and there marries, without consent, a subject of another
" foreign country, by the laws of which such a marriage
" would be valid—which law is to prevail? to which
" country is an English Tribunal to pay the compliment
" of adopting its Law? As far as the Law of nations is
" concerned, each must have an equal right to claim respect
" for its laws. Both cannot be observed. Would it not,
" then, be more just, and therefore more for the interest
" of all, that the Law of that country should prevail which
" both are presumed to know and to agree to be bound by?
" Again, assume that one of the parties is English—would
" not an English subject have as strong a claim to the bene-
" fit of English Law as a foreigner to the benefit of foreign
" Law? But it may be said that in the case now before
" the Court both parties are French, and therefore no such
" difficulty can arise. That is true; but if once the prin-
" ciple of surrendering our own Law to that of a foreign
" country is recognized, it must be followed out to all its
" consequences; the cases put are, therefore, a fair test as
" to the possibility of maintaining that by any *comitas* or
" *jus gentium* this Court is bound to adopt the Law of
" France as its guide. Huber, indeed, in the passage
" cited, after vindicating the refusal to acknowledge a
" marriage solemnized abroad between parties who have
" gone there to evade the Laws of their own country, pro-
" ceeds: 'Multoque magis statuendum est eos contra jus

" ' gentium facere videri qui civibus alieni imperii suâ
" ' facilitate jus patriis legibus contrarium scientes volentes
" ' impertiuntur.'

" It is somewhat difficult to ascertain what Huber
" would require to be done by foreigners in order that they
" may be exempted from his reproach. He assumes that
" they are *scientes*. Is it intended that they are to enquire
" and ascertain whether the Law of any foreign nation
" will be evaded if the proposed marriage is solemnized?
" Is the domicil of the parties and the Law prevailing
" there to be investigated? Are the parties to be called
" upon to prove their ages, consent of certain relations, or
" the non-existence of certain relations? or that they have
" not come to this country to evade the laws of their own?
" Are the clergy of this country to be deemed *scientes* that
" a foreign law is about to be evaded unless they have
" proof to the contrary? Unless that proposition can be
" established, the reproach of violating the Law of nations
" cannot attach to this country if such marriages are here
" celebrated.

" The great importance of having some one certain
" rule applicable to all cases; the difficulty, not to say im-
" possibility, of having any rule applicable to all cases,
" save that the Law of the country where a marriage is
" solemnized shall, in that country at least, decide whether
" it is valid or invalid; the absence of any judicial decision
" or *dictum*, or of even any opposite opinion of any writer
" of authority on the Law of nations, have led us to the
" conclusion that we ought not to found our judgment in
" this case on any other rule than the Law of England as
" prevailing amongst English subjects.

" France may make laws for her own subjects, and im-
" pose on them all the consequences, good or evil, that re-
" sult from those laws; but England also may make laws
" for the regulation of all matters within her own territory.
" Either nation may refuse to surrender its own laws to
" those of the other, and if either is guilty of any breach

" of the *comitas* or *jus gentium*, that reproach should attach " to the nation whose laws are least calculated to ensure " the common benefit and advantage of all. For these " reasons we feel bound to dismiss this petition.

" It may be unfortunate for the petitioner that she " should be held a wife in England and not so in France. " If she had remained in her own country, she might have " enjoyed there the freedom conferred upon her by a " French Tribunal; having elected England as her resi- " dence, she must be contented to take English Law as " she finds it, and to be treated as bound by the contract " which she there made. The novelty and importance of " the question have cast upon the Court much anxiety, " but from some portion of it we are relieved by the con- " sideration that, if our judgment is wrong, it may be " corrected by the highest tribunal in this country."

No appeal was prosecuted from this judgment, but it seems to have been approved of by the House of Lords. Referring to the decision of *Simonin* v. *Mallac*, Lord Campbell said:—

" But was there anything here inconsistent with the " opinion which the same learned Judge delivered as " Assessor to Vice-Chancellor Stuart in *Brook* v. *Brook*? " Nothing whatever; for the objection to the validity of " the marriage in England was merely that the forms pre- " scribed by the *Code Napoléon* for the celebration of a " marriage in France had not been observed. But there " was no law of France, where the parties were domiciled, " forbidding a conjugal union between them; and if the " proper forms of celebration had been observed, this " marriage by the law of France would have been unim- " peachable. The case, therefore, comes into the same " category as *Compton* v. *Bearcroft* (*d*), and *Steele* v. " *Braddell* (*e*), decided by *Dr. Radcliff*. None of these

(*d*) *Buller's N. P.* pp. 113, 114.
(*e*) *Milw. Ecc. Rep.* (*Ir.*) p. 1.

" cases can show the validity of a marriage which the Law " of the Domicil of the parties condemns as incestuous, and " which could not, by any forms or consents, have been " rendered valid in the country in which the parties were " domiciled " (*f*).

That French subjects should be judicially pronounced to be lawfully married according to English Law, after it has been judicially pronounced by a sentence of the French Court that the marriage was null and void—the French Law being the Law of their Origin and Domicil, though England was the country of the contract—is certainly a very deplorable state of Private International Jurisprudence.

The truth is that the refusal to recognize an incestuous marriage, which has been relied on, is not an analogous case; but the disabilities of the Royal Marriage Act do furnish one; and if England expects that restriction to be recognized in foreign countries on the ground of public policy, it would be difficult to say why the foreign country, which holds the preliminary consents of certain persons to be a matter of public policy, should not have its restriction equally respected.

[CCCCXXXV.B. The House of Lords in *Brook* v. *Brook* admitted a distinction between an objection to the validity of a marriage, resting only on default of certain forms and consents required by the law of the domicil, and an objection on the ground that the law of the domicil altogether incapacitated the parties from intermarrying. But the main question stated above—viz. " Whether the " Court of the place of the contract of marriage ought " to recognize the incapacities affixed by the law of their " domicil on the parties to the contract "—still awaits the decision of the highest tribunal; and there has been in the meanwhile some variance of opinion in the Courts below.

In the case of *Sottomayor* v. *De Barros* a marriage

(*f*) *Brook* v. *Brook*, 9 *House of Lords Rep.* p. 218.

took place at a registry office in London between two first cousins, Portuguese by birth, but at that time living in England. The wife subsequently petitioned the Probate Division of the High Court for a declaration of nullity, on the ground mainly that by the law of Portugal first cousins are declared incapable of intermarrying. In the Court below Sir Robert Phillimore (the writer of this work), on the assumption that the domicil of both parties at the date of the marriage was Portuguese, dismissed the petition. "If this important question," he said, "were "not embarrassed by precedents of former decisions, and "especially by the judgment on *Simonin* v. *Mallac*, I "might have been inclined to hold that the *jus gentium* "would require the *lex fori*, which is also the *lex loci con-* "*tractûs*, to adopt for the occasion as its own law the *lex* "*domicilii*; as in an analogous case, that of *Dalrymple* v. "*Dalrymple*, Lord Stowell speaks of the law of England "withdrawing altogether and leaving the legal question "to the exclusive judgment of the law of the foreign "country. But having regard to the decisions upon this "subject, and especially to that of *Simonin* v. *Mallac*, I "do not think that, sitting as a single judge in an English "Court, I ought to pronounce this marriage contracted in "England, and valid by English law, to be null, and I "must decline to do so." (*g*)

This decision was reversed on appeal, the assumption that both parties had a Portuguese domicil being still maintained. Lord Justice Cotton, in delivering the judgment of the Court (L. JJ. James, Baggallay, and Cotton), said, "If the parties had been subjects of Her Majesty "domiciled in England, the marriage would undoubtedly "have been valid. But it is a well-recognized principle "of law that the question of personal capacity to enter "into any contract is to be decided by the law of domicil. "It is, however, urged that this does not apply to the

(*g*) *L. R.* 2 *P. D.* p. 89.

" contract of marriage, and that a marriage valid accord-
" ing to the law of the country where it is solemnized is
" valid everywhere. That, in our opinion, is not a correct
" statement of the law. The law of a country where a
" marriage is solemnized must alone decide all questions
" relating to the validity of the ceremony by which the
" marriage is alleged to have been constituted; but, as in
" other contracts, so in that of marriage, personal capacity
" must depend on the law of domicil; and if the laws of
" any country prohibit its subjects within certain degrees
" of consanguinity from contracting marriage, and stamp
" a marriage between persons within the prohibited de-
" grees as incestuous, this, in our opinion, imposes on the
" subjects of that country a personal incapacity, which con-
" tinues to affect them so long as they are domiciled in
" the country where this law prevails, and renders invalid
" a marriage between persons both at the time of their
" marriage subjects of and domiciled in the country which
" imposes this restriction, wherever such marriage may
" have been solemnized." After dealing with the argu-
ments that this marriage was declared incestuous only by
the law of a particular state, not by the general law of
Christendom, and that the disability imposed by Portugal
might be removed by a Papal dispensation, the Lord
Justice continued, " Our opinion on this appeal is confined
" to the case where both the contracting parties are, at
" the time of their marriage, domiciled in a country the
" laws of which prohibit their marriage. All persons are
" legally bound to take notice of the laws of the country
" where they are domiciled. No country is bound to re-
" cognize the laws of a foreign state when they work in-
" justice to its own subjects, and this principle would
" prevent the judgment in the present case being relied
" on as an authority for setting aside a marriage between
" a foreigner and an English subject domiciled in England,
" on the ground of any personal incapacity not recognized
" by the law of this country."

Both *Brook* v. *Brook* and *Simonin* v. *Mallac* were referred to in the judgment; it was considered that the former case was not decisive, but that the reasons given by the Lords for their opinions strongly supported the principle on which this judgment was based. As to the latter, Lord Justice Cotton said, "The objection as to "the validity of the marriage in that case, which was "solemnized in England, was the want of the consent of "parents required by the law of France, but not under "the circumstances by that of this country. In our "opinion, this consent must be considered a part of the "ceremony of marriage, and not a matter affecting the "personal capacity of the parties to contract marriage; "and the decision in *Simonin* v. *Mallac* does not, we think, "govern the present case. We are of opinion that the "judgment appealed from must be reversed, and a decree "made declaring the marriage null and void" (*h*).

The case was remitted to the Probate Division for the determination of the issues of fact, and it was found that the domicil of the respondent (the husband) at the date of the marriage was English. The judgment of the Court of Appeal, based on a contrary assumption, consequently did not apply, and the petition was finally dismissed. In giving judgment to that effect, the President (Sir James Hannen) referred to the judgment of the Court of Appeal. "I must observe that the Lords Justices appear to have "laid down as a principle of law a proposition which was "much wider in its terms than was necessary for the "determination of the case before them. It is thus ex-"pressed: 'It is a well-recognized principle of law that "'the question of personal incapacity to enter into any "'contract is to be decided by the law of domicil;' and "again, 'As in other contracts, so in that of marriage— "'personal capacity must depend on the law of domicil.' "It is of course competent for the Court of Appeal to lay

(*h*) *L. R.* 3 *P. D.* pp. 5-7.

" down a principle which, if it formed the basis of a judg-
" ment of that Court, must, unless it should be disclaimed
" by the House of Lords, be binding in all future cases.
" But I trust that I may be permitted without disrespect
" to say that the doctrine thus laid down has not hitherto
" been 'well recognized.' On the contrary, it appears to
" me to be a novel principle, for which up to the present
" time there has been no English authority. What
" authority there is seems to me to be the other way."

After citing *Burge*, vol. i. c. 4, p. 132, *Story, Conflict of Laws*, s. 103, and *Sir C. Cresswell* in *Simonin* v. *Mallac*, the President proceeded: " I cannot but think, therefore,
" that the learned Lords Justices would not desire to base
" their judgment on so wide a proposition as that which
" they have laid down with reference to the personal
" capacity to enter into all contracts. In truth, very many
" and serious difficulties arise if marriage be regarded
" only in the light of a contract. It is indeed based upon
" the contract of the parties, but it is *a status arising out*
" *of a contract* to which each country is entitled to attach
" its own conditions, both as to its creation and duration.
" In some countries no other condition is imposed than
" that the parties, being of a certain age and not related
" within certain specified degrees, shall have contracted
" with each other to become man and wife; but that in
" these countries marriage is regarded not merely as a
" contract is clear, since the parties are not at liberty to
" rescind it. In some countries certain civil formalities
" are prescribed: in others a religious sanction is required.
" If the subject be regarded from this point of view, the
" effect of the recent decision of the Court of Appeal
" has only been to define a further condition imposed by
" English Law, namely, that the parties do not both belong
" by domicil to a country, the laws of which prohibit their
" marriage. But, as I have already pointed out, that
" judgment expressly leaves altogether untouched the case
" of the marriage of a British subject in England, where

" the marriage is lawful, with a person domiciled in a " country where the marriage is prohibited. With regard " to such a marriage all the arguments which have hitherto " been urged in support of the larger proposition, that a " marriage good by the law of the country where solemnized " must be deemed by the tribunals of that country to be " valid, irrespective of the law of the domicil of the " parties, remain with undiminished effect." (*i*)

Having quoted and discussed at some length the judgment in *Simonin* v. *Mallac* (*j*), the President pronounced the marriage valid, and dismissed the petition (*k*).]

CCCCXXXVI. The great advantage of looking to the *lex loci contractûs* alone for the validity of the marriage is the simplicity of its principle, namely, to maintain, at the cost of all other considerations, the sacredness of the Marriage bond, and the consequent legitimacy of children.

It has been forcibly contended that it is for the general interest of mankind that this principle should be maintained at the cost of all others. It must, however, be maintained at a very considerable cost, inasmuch as it practically facilitates and encourages the violation of other laws and of other rights, such as those of the parents (*l*). The professed policy of the English Statute (*m*) governing

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(*i*) *Vide suprà*, § cccviii. note (*p*), case of *Monsieur R.*

(*j*) *Suprà*, § ccccxxxv.A.

(*k*) *L. R.* 5 *P. D.* pp. 100-106.

(*l*) *Story*, ss. 51-68. *Paul* and *John Voet* appear to be almost the only jurists of eminence who confine the authority of the *personal statute* to the domicil of the party, and allow it no *extra*-territorial operation.

P. Voet, *De Stat.* s. 4, c. ii. p. 137 (ed. 1661).

J. Voet, *Ad Pand.* lib. i. t. iv. s. 7, p. 40.

Meier, however, maintains the doctrine of the English Law. 2 *D.* p. 34—" Nuptiarum enim celebratio, tanquam actus a nullâ causâ aliâ pendens, loci in quo perficitur legibus consentanea esse debet ; quare si de facultate contrahentium atque de solemnitatibus observandis causa quæritur, jurium in isto loco obtinentium rationem esse habendam existimamus.

(*m*) 4 Geo. IV. c. 76, s. 23.

the marriage of English subjects in England is—however little practical effect it may have—to uphold the bond of Marriage, and to deprive the contracting party who violates his native Law of all pecuniary emoluments, as the course which best reconciles the two objects of maintaining the sacredness of an obligation—the interest of which so seriously affects third parties—and of vindicating the majesty of the violated domestic Law.

CCCCXXXVII. It should, moreover, be stated that by far the greater number of jurists, civilians, and canonists on the Continent, ancient and modern, are in accordance upon the point of considering personal incapacity as invalidating the marriage; while, on the other hand, the weight of this most valuable species of authority (*n*) is in favour of maintaining the principle that the formalities are governed *lege loci contractûs* (*o*). It follows, as a necessary consequence, from the fact that the preponderance of the authority of jurists is in favour of upholding the *Personal Statute*, at the expense of the validity of the marriage, that the same authority should be adverse to the validity of marriages contracted, not only at variance with a *Personal Statute*, but also *in fraudem legis domesticæ*.

CCCCXXXVIII. It is important to observe, that—though the proposition *locus regit actum* be applicable to

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(*n*) *Story*, s. 122, cites *Sanchez*, De Matr. t. iii. Disp. 18, s. 10, n. 26, 28.

John Voet, *Ad Pand.* lib. xxiii. t ii. s. 4, &c. (which were relied on in the case of *Scrimshire* v. *Scrimshire*, 2 *Haggard Consist. Rep.* p. 415).

Paul Voet, *De Stat.* s. 9, c. ii. n. 9.

Bouhier, *Cout. de Bourg.* c. xxvii. ss. 59–66.

Hertius, *De collis. Oper.* l. iv. art. 10.

Merlin, *Rép.* Mariage, I.

See, too, *Pütter*, Fremdenrecht, § 39.

(*o*) *Story*, s. 123.

Huberus, l. i. t. iii. ix.

Bouhier, *Cout. de Bourg.* c. xxviii. ss. 60–62.

P. Voet, *De Stat.* 9, c. ii.

J. Voet, *Ad Pand.* lib. xxiii. t. ii. s. 4.

Pothier, *Traité du Mariage*, n. 263, in the passage cited above.

the formalities attending the celebration of a marriage,—the converse of this proposition is not necessarily true,—viz. that if a marriage abroad be *not* celebrated according to the formalities *legis loci*, it is void.

The general practice of nations is to allow parties to choose which formalities they will adopt, those of their domicil, or those *legis loci contractûs*, and to hold the marriage valid if celebrated according to the formalities of either the one or the other.

The Court of Appeal at Dresden held that, where the parties observed the forms of their domicil, the marriage, though celebrated abroad, was valid, the domicil being the proper and permanent seat of the marriage (*p*).

Upon this point the opinion of Lord Stowell is very valuable as far as English marriages abroad are concerned. He says:—"It is true, indeed, that English decisions "have established the rule, that a foreign marriage, valid "according to the law of the place where celebrated, is "good everywhere else; but they have not *è converso* "established that marriages of British subjects, not good "according to the general law of the place where cele-"brated, are universally, and under all possible circum-"stances, to be regarded as invalid in England. It is, "therefore, certainly to be advised that the safest course "is always to be married according to the Law of the "country, for then no question can be stirred; but if this "cannot be done on account of legal or religious diffi-"culties, the Law of this country does not say that its "subjects shall not marry abroad. And even in these "cases where no difficulties of that insuperable magnitude "exist, yet, if a contrary practice had been sanctioned by "long acquiescence and acceptance of the one country "that has silently permitted such marriages, and of the

(*p*) *Savigny, R. R.* viii. s. 381 in fine, and note (*q*). The rule *locus regit actum*, he says, is only *facultative* and *optional*, and not *indispensably necessary*. "Dieses ist denn auch meist anerkannt worden."

" other that has silently accepted them, the courts of this " country, I presume, would not incline to shake their " validity upon these large and general theories, en- " countered as they are by numerous exceptions in the " practice of nations," (*q*).

CCCCXXXIX. Lastly, upon this subject of the formalities being governed *lege loci contractûs*, the opinion of Savigny (*r*) should be mentioned.

He is of opinion that the rule *locus regit actum*, is applicable to the forms of marriages; but still he thinks it a grave question, whether, when the Law of the domicil requires an *Ecclesiastical* ceremony, and the *lex loci contractûs* demands a proceeding before the Civil Magistrate only, a compliance with the latter Law would satisfy the Law of the domicil: and he advises parties who have been so *civilly* united, to be *ecclesiastically* married afterwards at the place of their domicil.

This proceeding, he says, must, according to the Common Law of Germany, validate retrospectively the marriage.

His advice is, of course, inapplicable, as he says, to the case of foreigners who, being previously married, become domiciled in the land which requires the religious ceremony.

[CCCCXXXIX.A. Although in India, Ceylon, and other parts of the British Empire, where Christianity is not the prevalent religion, polygamous marriages, and the relations arising from them, are acknowledged and regulated by the Law, yet in this country, it must be remembered, the Law attaches to the words " marriage " and " wife " a narrower signification. In *Bethell* v. *Hildyard* (*s*) the issue raised was the legitimacy of the child of C. Bethell, a domiciled Englishman, and Teepoo,

(*q*) *Ruding* v. *Smith*, 2 *Haggard Consist. Rep.* p. 390.
(*r*) *Savigny*, *R. R.* viii. s. 380, v. 35.
[(*s*) *L. R.* 38 *Ch. D.* p. 220.]

niece of the chieftain of the Baralongs—a tribe inhabiting a portion of South Africa outside the British dominions—amongst whom polygamy prevailed. Some ceremony of marriage according to Baralong custom was gone through, and the parties lived together amongst the tribe until just before the death of Bethell, which took place in Bechuanaland in an encounter with the Boers. Two decisions, by the Courts of Lower Canada and of Missouri, which supported the contention that the Baralong marriage was a valid one, and the child legitimate, were cited. Mr. Justice Stirling, however, basing his opinion on the judgments of Lord Brougham in *Warrender* v. *Warrender* (*t*), and of Lord Penzance in *Hyde* v. *Hyde and Woodmansee* (*u*), held "that a union formed between a man and a "woman in a foreign country, although it may there bear "the name of a marriage, and the parties to it may there "be designated husband and wife, is not a valid marriage "according to the law of England unless it be formed on "the same basis as marriages throughout Christendom, and "be in its essence 'the voluntary union for life of one man "'and one woman to the exclusion of all others.'"

[(*t*) 2 *Clark and Finnelly Rep.* pp. 530–533.]

[(*u*) *L. R.* 1 *Prob. and Matrimonial*, p. 130, in which Lord Penzance, on a petition for the dissolution of a marriage that took place in Salt Lake City between two English Mormons then residing in the Territory of Utah, refused to recognize it as a valid marriage, on the grounds that marriage as understood in Christendom might, for the purposes under consideration, be defined as "the voluntary union for life of one man and one woman to the exclusion of all others," and that "the matrimonial law of this country is adapted to the Christian marriage, and is wholly inapplicable to polygamy." But his decision was expressly confined to the petition before him. "This Court," he observed, "does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."]

It may be added that, whilst a marriage, in order to be recognized by the English Courts, must have the basis above defined, the parties to such a marriage can claim relief whether they be Christians or not (*v*).]

[(*v*) *Vide infrà*, § ccccl*xxx*vii.]

CHAPTER XIX.

MARRIAGE—EFFECTS ON PROPERTY (*a*).

CCCCXL. THE maxim of the Roman Law, that the home of the husband becomes, immediately on marriage, the domicil of the wife, was expressed in very forcible language. The woman, said that law, if she be absent, cannot be married by letter or by proxy, "deductione enim "opus esse in mariti, non in uxoris domum, *quasi in domi-* "*cilium matrimonii*" (*b*).

It is well said by Savigny, that in this language is expressed not any peculiar characteristic of the positive Law of Rome, but a recognition of the relation which necessarily, and universally, springs from the general nature of the institution of Marriage. All States, accordingly, Christian and Heathen, appear to have founded their Marriage Laws upon this principle, as their basis—that the home of the husband is the domicil of the wife.

CCCCXLI. It may be useful to state the various questions of law which have been raised, and variously solved by various jurists, on the effect of Marriage upon the property of the wife.

(*a*) *Rocco*, p. 294.

Savigny, *R. R.* viii. s. 379.

Fœlix, liv. ii. t. i. c. ii. ss. 90, 91.

Story, c. vii. Marriages—Incidents to.

1 *Burge*, *Comm. on For. and Col. Law*, Pt. I. c. vii. Effect of marriage on the property of the husband and wife, and c. vi. s. 2.

Westlake, p. 352, &c.

(*b*) *Dig.* lib. xxiii. t. ii. 5.

Disabilities of American Women married abroad, by *W. B. Lawrence*, LL.D., New York, 1871.

CCCCXLII. These questions of *law* presuppose, however, a certain state of *facts* with respect to the *Marriage*, the *Property*, and the *Domicil* of the parties, which it is of importance to notice.

Firstly, as to the Marriage:—

The Marriage has taken place either,—

1. Without any express contract; or,
2. With an express contract.

Secondly, as to the Property:—

The Property has been acquired,—

1. Before the marriage; or,
2. After the marriage.

Thirdly, as to the Domicil:—

1. It is either the same as it was when the marriage was contracted; or,
2. It has been changed, and a new one acquired subsequently to the marriage.

CCCCXLIII. Upon one or other of these states of facts, the following questions of law have been raised:—

1. Assuming that the marriage has taken place *without express contract*, is the law which governs the property of married persons a Real or a Personal Statute? in other words, is it the *lex rei sitæ*, or the *lex domicilii* of the husband?

2. Is the law founded on the doctrine of a *tacit contract* between husband and wife? or does it spring, *proprio vigore*, from the relations of Marriage?

3. Does this law affect property acquired after, as well as before, the marriage?

4. If, after the marriage, a new domicil shall have been acquired in a State which has a law respecting the property of married persons other than, and different from, the law of the State which was the *domicilium matrimonii*—is the Law of the old or the new domicil to govern the question?

5. If the Law of the new domicil, does it govern both kinds of property—that acquired before, and that acquired after, the marriage?

6. If the Law of the husband's domicil allow, in the absence of any express contract, two modes of regulating the conjugal association as to property—as in France, where there are *le régime de la communauté* and *le régime dotal*—is it in the power of the husband or of the wife to choose which of the two modes shall prevail in the case of their marriage?

7. Assuming the marriage to have taken place under *express contract*, how does this fact affect the answer to the foregoing questions?

8. By what Law is the *express contract* to be interpreted? the Law of the place in which it was contracted? or the Law of the place in which it is to be executed? *lex loci contractûs?* or *lex domicilii matrimonii?*

CCCCXLIV. *a.* The answers which these questions have received from the jurists, the judges and the legislators of States, the basis of whose jurisprudence is the Roman Law, have not been uniform.

β. In England and Ireland, and in such of the United States of North America as have adopted the English Law, these questions have been but little discussed till lately; and then chiefly in England: and there have been, as will be seen, points of important difference between England and the United States in the exposition of the Law upon this subject.

CCCCXLV. *a.* With respect to the jurisprudence which is founded upon the Roman Law,—

First, Where the marriage has taken place *without any express contract*, the opinion soundest in principle and supported by the best authorities is thus expressed:—"Dic "indistinctè quod ad effectum et decisionem jurium matri- "monii, *ubi non fuit specificatum, nec facta relatio ad alium* "*certum*, inspiciatur locus domicilii habitationis viri desti- "natæ tempore matrimonii" (*c*).

(*c*) *Boullenois, Traité &c.* tom. ii. p. 262 (ed. 1766).

[See also *Dumoulin* (*Molinus*), *Comment. in Codicem Just.* Conclusiones de Statutis, p. 7. 'Hinc infertur ad quæstionem quotidianam

This rule prevails almost universally with respect to *moveable* property, and is adopted equally by those who build the Law of the Matrimonial domicil upon the theory of a tacit contract (*d*), and of those who adopt the doctrine that, *proprio vigore*, the Law of the husband's domicil prevails, inasmuch as persons marrying without express contract are presumed to marry with reference to the Law of the husband's domicil.

But with respect to immoveable property, the civilians differ greatly, first, as to the premiss whether the Law of the Community be *personal* or *real*; secondly, as to the premiss whether there be or be not a tacit contract; and lastly, they differ in the conclusions drawn from the same premiss. The soundest conclusion, and the most consistent with the general system of Comity adopted by continental writers, appears to be, that the Law of the Community extends to real property, where the *lex rei sitæ* does not prohibit it from doing so (*e*).

CCCCXLVI. But, if the husband change his domicil after marriage—

1. How does it affect property already acquired under it, or, as the civilians speak, *jus quæsitum*?

The weight of authority preponderates greatly in favour of the proposition that the rights of the husband or wife which have been once constituted by the Law of the Matrimonial domicil remain unaffected by any subsequent change of domicil.

Some authorities—Meier and Wächter, for example—make an exception in the case where the Law of the new *patria* expressly forbids, by positive law, the rights acquired under the old *patria*. But the force of reasoning and principle is against this exception.

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de contractu dotis et matrimonii, qui censetur fieri non in loco in quo contrahitur, sed in loco domicilii viri.]

(*d*) Savigny throws his great weight into this scale, *R. R.* viii. s. 379; "Diese Meinung halte ich für richtig."

(*e*) See authorities collected by Fœlix, Burge, and Story.

The general proposition is maintained equally by those who do and who do not maintain the theory of the tacit contract. The former say that a tacit, like any other, contract cannot be affected by the change of domicil or National *Status* of the parties to it. The latter maintain that the interest of the conjugal union demands certainty in the relations of property which flow from it, and that it is not to be tolerated that the husband, who has the absolute power of changing the National *Status* of himself and his wife when he pleases, should also have the power of modifying, for the sake of his own private and personal advantage, the settlement of property made by the Law at his marriage (*f*).

CCCCXLVII. Does the Law of the Matrimonial domicil affect property acquired subsequently to the marriage, after the original domicil has been lost and a new one obtained? A question certainly of no mean difficulty.

"In the opinion of the greater number of jurists" (Mr. Burge observes), "not only the property which had been "acquired by the husband and wife before their removal "from their Matrimonial domicil, but even that acquired "in their new domicil, is subject to the Law of the "Matrimonial domicil" (*g*).

The highest French authorities and the decisions of the French Courts support this position.

The Court of Paris in 1849, and the Court of Cassation in 1854, decided, conformably to the opinion of Fœlix, that *le régime matrimonial*, once established, ought not to be affected either by a change of National *Status* or of domicil on the part of the husband. Therefore, the French Courts have holden, in the case of an Englishman who, having married without express contract, established himself and became naturalized in France, and who had

(*f*) *Fœlix*, liv. ii. tit. i. c. ii. s. 91, and authorities there cited.
(*g*) 1 *Burge's Comm.* Pt. I. c. vii. s. 21.

purchased in France, *conjointly with his wife*, property considered by the Law of France as *immoveable*, that he obtained this property *solely* to himself, because such was the English Law, which was the Law of the Matrimonial domicil (*h*).

A stronger instance of the application of what appears to the writer of these pages to be a sound maxim of the *jus gentium* cannot well be imagined.

CCCCXLVIII. Of the three opinions, namely:—

1. That, in the absence of express contract, the Law of the Matrimonial domicil governs always and everywhere all property of the married parties, as the necessary legal result of the tacit contract between them:

2. That there is no such tacit contract, but that the Law of actual domicil governs the property, and therefore, in the event of a change of domicil, there may be a new law affecting the property:

3. The intermediate opinion, that there is no tacit contract, but that a change of domicil does not affect property already acquired, but only property acquired under the new domicil (*hh*):

Savigny declares, that he adopts without hesitation the first opinion, and reasons to the following effect:—

The first opinion is in accordance with the natural feeling of right and justice. It was competent to the wife —before marriage a free agent—to have insisted upon any stipulations which she liked, as a condition of her consent to the contract. She has not chosen to do so, but has relied, instead, upon the Law of the Matrimonial domicil, and she has naturally counted upon the continuance of that Law. Subsequently to the execution of the contract, the husband, in the exercise of his undoubted right, changes his domicil, and thereby subjects their joint property to the operation of a new Law. If the wife consent to this,

(*h*) See *M. Demangeat's* note to his edition of *Fœlix* (1856), tome i. p. 197 (liv. ii. tit. i. c. ii. s. 91).

(*hh*) *Savigny, R. R.* viii. s. 379, num. 3.

cadit quæstio, as lawyers speak; for she might by a new contract modify her rights. But, if she does not consent, is it competent to one party to the contract to alter, by his single will, the conditions of it, and so as to injure the other party? It is to prevent the possibility of such an injustice, that the doctrine of the tacit contract is maintained. The impugners of this doctrine have always recoiled from this argument.

But, in truth, the same goal may be reached by a different way. In every contract, be it express or tacit, the conformity of two wills is supposed; both parties, therefore, ought to know and understand the subject of their agreement.

CCCCXLIX. But, at the celebration of a marriage, can it be said that both parties, more especially that the wife, understood the Law of Property? Certainly not; and, therefore, the presumption of a tacit contract is inadmissible. But then it is to be remembered, that the voluntary submission of the parties is the foundation of the authority of the local law; that voluntary submission may be expressed negatively, as by the absence of contradiction. In the case, however, of the disagreement of husband and wife, there is no such voluntary submission to the local law of the new domicil; therefore, there is no ground whatever to support a change of the rights of the conjugal union, even in the opinion of those who hold that the local law and not the contract governs the question. A different doctrine, therefore, leads us to the same result as the tacit contract; namely, the unchangeableness of the Law of the Matrimonial domicil. Another way of stating the matter is, that those who maintain this unchangeableness, not on the ground of a *tacit contract*, but on the ground of the right accruing from the law of the original domicil, seem to adopt the doctrine of a *fictitious contract*, such as prevails in the case of the *pignus tacitè contractum*, which does not require that the parties should clearly understand the consequence of their act. It is a mere difference of expression.

The essential point is, that each party has a distinct definite right independent of the arbitrary will of the other (*i*).

CCCCL. Savigny points out the injustice and cruelty of the doctrine that the change of the husband's domicil affects property already acquired, by this illustration:—A rich man marries a poor woman, and, by the Law of the Matrimonial domicil, marriage creates a community of goods in the widest sense. He afterwards transfers his domicil to a State in which the Law of the Dotal Régime (*Dotal-Recht*) prevails; and the wife, according to this doctrine, loses, without her consent, the portion of property which she has already acquired.

Savigny, nevertheless, agrees with Wächter, that, if in the new domicil there prevailed a law of the most rigorous obligation and exclusive character—a law, for instance, which forbade a marriage to be contracted except under the Dotal Régime, and that no stipulations relating to a marriage otherwise contracted should be executed in the territory; such a law would constitute an odious but binding exception. Of the existence of such a law he is happily ignorant (*k*).

CCCCLI. The Law of the kingdom of Prussia is, in its general character, and with some subordinate exceptions, in accordance with the opinion expressed by Savigny, and holds, that the Law of the [first] Matrimonial domicil is always and everywhere binding (*l*).

(*i*) *Savigny, R. R.* viii. s. 379, num. 3, and note (*m*).

(*k*) *Savigny, R. R.* ibid., num. 3.

[(*l*) *Allgemeines Landrecht für die Preussischen Staaten* (Berlin, 1876), Theil II. Titel i. §§ 350, 351.

§ 350. "Durch Provincialgesetze und Statuten wird die Gemeinschaft der Güter nur alsdann begründet, wenn, an dem Orte, wo die Eheleute, nach vollzogener Heirath, ihren *ersten* Wohnsitz nehmen, dergleichen Gesetze vorhanden sind."

§ 351. "Die Veränderung dieses ersten Wohnsitzes verändert in der Regel nichts an den Rechten, welchen sich die Eheleute vorher unterworfen haben."

See also §§ 345-349, 352-356. Provision is made in § 352 as to dealings with third parties after a change of domicil.]

CCCCLII. What effect has the change of domicil on immoveable property?

The great majority of foreign jurists hold that the Law of the Matrimonial domicil affects immoveable property, and remains unaltered by the change of domicil.

We have seen, in the case recently cited, how strongly the French Tribunals hold this opinion. And it certainly appears to be the legitimate conclusion from the premiss that the Law of the Matrimonial domicil is, in the absence of express contract, the Law which governs the Marriage Contract, whether this premiss be founded on the hypothesis of a tacit contract, or on the hypothesis of a voluntary submission to the Law of the Matrimonial domicil.

CCCCLIII. According to the French Law, persons may be married under (1) *communauté de biens*, or (2) the *régime dotal* (*m*). And the best authorities hold, that, in the absence of any express stipulation to the contrary, it is for the Law of the Matrimonial domicil to decide under which of these two the marriage was contracted.

But, if that Law decide in favour of the *régime dotal*, the questions remain, (1) what property is dotal? (2) what is the condition of the dotal property (*biens dotaux*)? *e.g.* is it alienable or not? and by reference to what law are these questions to be answered? Fœlix and some authors are of opinion that here the *lex sitûs* governs; because these are matters under the control of the *Real* Statute (*mm*).

M. Demangeat (*n*) shows very forcibly the inconsistency and weakness of this opinion, and observes that the third article of the Code, "Les immeubles, même "ceux possédés par *les étrangers, sont régis par la loi*

[(*m*) *Code Civil*, art. 1391. "Les époux peuvent déclarer, d'une manière générale, qu'ils entendent se marier ou sous le régime de la communauté, ou sous le régime dotal."]

(*mm*) *Fœlix*, s. 60.

(*n*) Note to *Fœlix*, s. 90.

See, also, *M. Demangeat's* essay already cited, *Du Statut Personnel*, *Rev. Prat. de Droit Français*, pp. 59-61.

Française," does not apply to a case where the judge is simply called upon to interpret the intention of contracting parties; and that the French Tribunals have more than once decided that this article of the Code was not applicable to the case of an Englishman who had married without contract, and had afterwards purchased immoveable property in France. He says, those who hold the contrary opinion are influenced by the maxim of the Roman Law, "*interest Reipublicæ mulieres dotes salvas* "*habere*," and consider the question of the alienability or inalienability of Dotal Property, as a matter of public order. He denies that the Roman maxim, framed to encourage second marriages, is applicable to Christian States; and maintains strongly the authority of the Law of the Matrimonial domicil over all immoveables everywhere, except, indeed, in States which have, by express positive law, forbidden, as a matter of public policy, the application of this Law to immoveables, within the limits of their territories (*o*).

CCCCLIV. The answer to the two last questions (7, 8) propounded will be easily anticipated.

(7) Where there has been an express contract, the stipulations contained in it are everywhere of binding force.

(8) With respect to the interpretation of such a contract, it must be according to the Law of the Matrimonial domicil: nor in this case is there even the *presumption* which arises in the case of other contracts, that the parties intended to refer to the *lex loci contractûs* (*p*).

(*o*) *Rocco* is very clearly of the same opinion : "S' immagini che si stipuli in Napoli un contratto di matrimonio con le forme e le solennità chieste dalle leggi nostre. S' immagini ancora che i conjugi, e massime il marito possedano alcuna proprietà *immobiliare* nel territorio Francese. Poste le cose dette di sopra, senza alcun dubbio questo contratto al pari degli altri, come la pruova della convenzione avuta fra i consorti e delle mutue loro obbligazioni e diritti, avrà effetto eziandio sopra i beni collocati nell' estere contrade."—pp. 294–5.

(*p*) "En général (*M. Demangeat* observes), pour interpréter un acte

CCCCLV. β. Upon the subject of the property of married persons, we have considered the opinions of jurists, and the decisions of judges, in those States of the European Continent whose jurisprudence is founded on the Roman Law. We have now to consider the Law of England and of the United States of North America upon the same subject: and first, as to the latter country.

CCCCLVI. The United States of North America are governed partly by the English, partly (that is, in Louisiana) by the Roman, Law. In Louisiana the Law of the *communio bonorum*, between husband and wife, prevails. Some of the important questions which have been already discussed in this chapter have been the subject of decisions in the tribunals in that State before its present Revised Code was passed, which contains special provisions thereupon.

CCCCLVII. The Supreme Tribunal of Louisiana has holden—

1. That the Law of Community is a Real Statute relating to Things rather than Persons.

2. That where there is an Express Contract, that governs all previously acquired property.

3. That where there is no Express Contract, the Law of the Matrimonial domicil governs the subject.

4. In both cases all property acquired after marriage by persons who have, since their marriage, come to dwell in Louisiana, is governed by the Law of Community which prevails in that State.

5. It is not competent to persons residing in Louisiana

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dont les clauses sont obscures, pour suppléer à ce qu'il y a d'insuffisant dans l'expression de la volonté des parties, on recourt à la loi du lieu où l'acte a été passé : il est, en effet, assez naturel de présumer que c'est à cette loi que les parties ont voulu se référer. Mais en matière de conventions matrimoniales la même présomption ne s'applique plus, et l'on ne tient pas compte de ce que, par événement, ces conventions auraient été passées au mariage lui-même célébré ailleurs qu'au lieu du domicile du mari."—*Rev. Prat. ubi supra*, p. 59.

to enter into a marriage contract which provides that the effects of it on their property shall be governed by a foreign Law. In the case which elicited this decision, the marriage was celebrated in the State of Louisiana (*q*).

6. A man ran away with a young lady (*r*), a minor of thirteen years of age. Both of them, at the time, were domiciled in Louisiana. They were married, without the consent of her parents, at Natchez, in Mississippi, and they then returned to Louisiana. The wife afterwards died, while they were living in that State; after her death, her mother claimed her property, as it would descend by the Law of Louisiana. The court pronounced in favour of her claim, on the double ground—

(i.) That the parties had the State of Louisiana in contemplation of their contract.

(ii.) That the minor could not remove the incapacity which the Law of her domicil (Louisiana) had affixed upon her, to the detriment of a citizen of Louisiana. By that law a minor who marries cannot give away any part of his property without the sanction of those whose consent is necessary for the validity of the marriage. By the Law of the domicil, the mother was entitled to the inheritance of her child. It was not the Municipal Law of Mississippi which was to govern the case; but International Law, according to which personal incapacities, affixed by the Law of the domicil, travel with the person whithersoever he goes (*s*).

(*q*) *Bourcier* v. *Lanusse*, 3 *Martins'* (*Americ.*) *Rep.* p. 581; *Story*, s. 179.

(*r*) *Le Breton* v. *Nouchet*, 3 *Martins'* (*Americ.*) *Rep.* p. 60; *Story*, s. 180.

(*s*) This doctrine is the reverse of what Story has holden on the validity of foreign marriages *in fraudem legis domesticæ*, and identical with that of Continental Jurists, and Mr. Justice Cresswell's dictum in *Brook* v. *Brook*; therefore Story, though he adopts these Louisiana decisions as the general Law of the North American United States, says "upon some of the doctrines of which, as stated by the Court, there, perhaps, may be reason to pause; but the grounds are, nevertheless, stated with great force."—*Story*, s. 180.

7. A marriage settlement, executed in another State, where the parties at the time resided, and where the property was situated, if valid by the laws of the place where made, cannot be affected by the subsequent dwelling of the parties in another State (*t*).

CCCCLVIII. Story says that these doctrines of the Louisiana Courts will, "most probably, form the basis of "the American jurisprudence on this subject" (*u*). And he lays down the following propositions (*x*) as those which, though not universally established or recognized, are nowhere gainsaid by "domestic authority," and ought to be adopted.

(1) "Where there is a marriage between parties in a "foreign country, and an express contract respecting their "rights and property, present and future, that, as a matter "of contract, will be held equally valid everywhere, unless, "under the circumstances, it stands prohibited by the Laws "of the country where it is sought to be enforced. It will "act directly on moveable property everywhere. But, as to "immoveable property in a foreign territory, it will, at "most, confer only a right of action, to be enforced accord- "ing to the jurisprudence *rei sitæ* (*y*).

(2) "Where such an express contract applies in terms, "or intent only, to present property, and there is a change "of domicil, the Law of the actual domicil will govern the "rights of the parties as to all future acquisitions (*z*).

(3) "Where there is no express contract, the Law of the "Matrimonial domicil will govern, as to all the rights of "the parties to their present property in that place, and as "to all personal property everywhere, upon the principle "that moveables have no *situs*, or rather, that they accom-

(*t*) *Young* v. *Templeton*, 4 *Louis. Ann.* p. 254. *Story*, s. 182.a.
(*u*) *Ibid.* s. 183.
(*x*) *Ibid.* ss. 184-188.
(*y*) *Ibid.* s. 184.
(*z*) *Ibid.* s. 185.

"pany the person everywhere. As to immoveable property, "the Law *rei sitæ* will prevail (*a*).

(4) "Where there is no change of domicil, the same rule "will apply to future acquisitions as to present property.

(5) "But, where there is a change of domicil, the Law "of the actual domicil, and not of the Matrimonial domicil, "will govern as to all future acquisitions of moveable pro- "perty; and, as to all immoveable property, the Law *rei* "*sitæ* (*b*).

(6) "And here also, as in cases of express contract, the "exception is to be understood, that the Law of the place "where the rights are sought to be enforced, do not pro- "hibit such arrangements; for, if it do, as every nation "has a right to prescribe rules for the government of all "persons and property within its own territorial limits, its "own Law, in a case of conflict, ought to prevail" (*c*).

CCCCLIX. It remains to consider the Law of England upon the subject of this chapter, which is not, in every respect, identical with the propositions laid down by Story.

The effect ascribed by that Law to a foreign marriage, must be considered, both as to Personal and Real Property. And, first, it may be well to state, briefly, the Domestic Law of England—independently of any express contract—upon an English marriage with respect to both kinds of Property.

CCCCLX. Speaking generally, by the common Law of England [before the special legislation on this subject presently referred to], all the Personal Property of the wife, whether it accrued to her before or after her coverture, was conferred by marriage, in the absence of express contract, upon the husband.

Practically, however, this rule of the Common Law seldom operated to the injury of the wife; for the Courts of

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(*a*) *Story*, s. 186.
(*b*) *Ibid.* s. 187.
(*c*) *Ibid.* s. 188.

Equity allowed the wife to have a separate and independent estate in whatever property or interest was secured to her through the medium of a trustee; provided, that the intention of the grantor were distinctly declared, that she should have it to her *sole and separate use.* And, if the wife became, during her coverture, entitled to any equitable property, *not* settled to her sole and separate use, though the Courts of Equity allowed the husband to claim it as his own, they would not assist his claim, except on the condition of his making an adequate provision for her out of the fund, unless she already enjoyed a competent settlement, or freely consented to its being paid over to him without condition.

CCCCLXI. As to that peculiar portion of Personal Property called *chattels real,* the law was, that, as to terms of years and other chattels real, of which the woman was possessed at the time of the marriage, or which accrued to her during coverture, the husband became, by the marriage, possessed of them in her right; and he was entitled, not only to the profits and the management during their joint lives, but he also might dispose of them as he pleased by any act during the coverture; and they were liable to be taken in execution for his debts; and, if he survived her, they were absolutely his; but he could not devise them by will: and, if he made no disposition of them in his lifetime, and she survived him, they remained to her at his death, by virtue of her original title, and did not go to his executors (*d*).

CCCCLXII. As to Real Property, the law was, that all freeholds of which the wife was seised at the time of the marriage, or afterwards, were by law vested in the husband and wife, during the coverture, in right of the wife. During their joint lives, the husband was entitled to the profits, and had the sole control and management; but could not convey or charge the lands for any longer period than while

(*d*) *Stephen's* (*Blackstone's*) *Comm.* Book iii. chap. ii.

his own interest continued. If her real estate were an estate of inheritance, whether fee simple or fee tail, and he had had actual seisin thereof, and there had been a child of the marriage born alive and capable of inheriting the property, the husband, upon the wife's decease, became solely seised of such estate for his life, and was said, in that case, to be tenant by the curtesy of England. But, subject to these limited rights of the husband, the freeholds of the wife were not affected by the marriage, and continued to belong to her and her heirs (*f*).

[CCCCLXII.A. The law was in some respects modified by the two Married Women's Property Acts of 1870 and 1874, which among other provisions enacted that any property coming under an intestacy to a wife married after 9th August, 1870, and any earnings gained by a wife, should belong to her independently of her husband. Both these Acts were repealed by the Married Women's Property Act 1882 (*g*), which abrogated the ancient rule of the Common Law and practically placed a married woman with regard to acquiring, holding, and disposing of real or personal property, and making contracts binding such property, on the footing of a *feme sole*.

The Act left untouched previously acquired interests of the husband in the case of a marriage contracted before the commencement of the Act (January 1st, 1883), and did not interfere with existing marriage settlements, nor with the power (except as to one point in favour of creditors of the wife) to make them in future.

The Act applies to Ireland, but not to Scotland, the law of which country is regulated by a separate Act, passed in 1881, and containing analogous provisions (*h*).

The passing of these Acts has so materially altered the law that it has been thought desirable to state all the

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(*f*) *Stephen's* (*Blackstone's*) *Comm. ubi sup.*

[(*g*) 45 & 46 Vic. c. 75.

(*h*) 44 & 45 Vic. c. 21.]

propositions in §§ CCCCLX, CCCCLXI, & CCCCLXII in the past tense, though there are still transitional cases to which the old law applies.]

CCCCLXIII. In England there are two modes of providing for the wife out of the husband's *real* estate:—

1. By Dower.

2. By Jointure, or Settlement; that is, what has been called *express contract.*

1. Dower is the provision made by the Common Law, for the support of the wife, and the nurture and education of younger children.

It is thus described by Littleton (*i*):—"Tenant in Dower "is, where a man is seised of certain lands or tenements in "fee simple, fee tail general, or as heir in special tail, and "taketh a wife and dieth, the wife, after the decease of her "husband, shall be endowed of the third part of such lands "and tenements as were her husband's at any time during "the coverture, to have and to hold to the same wife in "severalty by metes and bounds, for term of her life, "whether she hath issue by her husband or no, and of what "age soever the wife be, so as she be past the age of "nine years at the time of the death of her husband."

[CCCCLXIV.A. (*k*) Before 1834 the right of Dower attached only to the legal and not to the equitable estates of the husband, and advantage was taken of this to defeat it by various devices of conveyancing. By 3 & 4 Will. IV. c. 105, Dower has been extended to equitable estates, but is made completely dependent upon the will of the husband. The law of Dower is now rarely called into force, being commonly superseded by the express contract of the parties.

CCCCLXV.A. 2. What is known as a legal "Jointure" was first authorized by the 6th section of the Statute of Uses (*l*), under which Dower might be barred by the wife's

(*i*) Section 36.

(*k*) §§ cccclxiv. and cccclxv. of the former edition have been omitted, as the law to which they referred is obsolete.

(*l*) 27 Henry VIII. c. 10.

acceptance in satisfaction thereof, previously to marriage, of a competent livelihood of freehold lands and tenements to be enjoyed after the death of the husband for the life of the wife at least. This method fell into desuetude, and the section was repealed in 1863 by the Statute Law Revision Act.

Provision for the wife is now made, as a general rule, by express contract contained in settlements drawn up in each case previously to the marriage.]

CCCCLXVI. The decisions of the English Tribunals establish, as a maxim of English Jurisprudence, that where there is an express contract, it is governed, as to its construction, by the Law of the Matrimonial domicil.

CCCCLXVII. In *Dues* v. *Smith* (*p*)—one of the early cases—the Master of the Rolls, in 1822, made an Order that money belonging to the wife be paid to the husband, the parties being subjects of Denmark, and the Law of that country not requiring a settlement.

CCCCLXVIII. In the case of *Anstruther* v. *Adair* (*q*), it was decided by Lord Chancellor Brougham, in 1834, that where a contract is made between persons domiciled in a foreign country, and in a form known to the Law of that country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the foreign Law would have given to it. Where, therefore, a domiciled Scotchman is entitled, in Scotland, by virtue of a Marriage Contract executed there, and in the Scotch form, to receive whatever property accrued during coverture to his wife, this Court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an English equity for a settlement in favour of the wife, in opposition to the provisions of the Scotch contract.

CCCCLXIX. In *Byam* v. *Byam*, in 1854, Sir John

(*p*) *Jacob's Rep.* p. 544.
(*q*) 2 *Mylne & Keene*, p. 513.

Romilly, M.R., in his judgment, observed:—"This is a "cause, the object of which is, to obtain from the Court "its opinion upon the construction to be put on certain "articles of Marriage, entered into between Major-General "Byam and his wife, then Miss Temple, at Florence, in "the month of September, 1829. Properly speaking, a "marriage settlement ought to be executed in pursuance "with those articles, carrying their executory provisions "into effect. The parties, however, are desirous to avoid "that expense, and this object may be accomplished by "obtaining from this Court a declaration as to the true "meaning of the articles, upon which declaration the "parties will be able to act, without causing a formal "instrument to be prepared and executed. . . .

"The articles were executed at Florence, and were drawn "up in the Italian language; a translation, however, is "verified, for the purposes of this cause, and it is not dis-"puted; and, indeed, it is so expressed in the body of the "deed itself, that this is an instrument entered into be-"tween English subjects, and to be construed according to "English rules of construction" (*r*).

CCCCLXX. English subjects may agree that their contract shall be according to a Foreign Law. In the case of *Este* v. *Smyth* (*s*), before the Master of the Rolls, in 1854, it appears that doubts were raised whether a marriage between English subjects, at the British Embassy in Paris, would be recognized as valid by the French Tribunals, and whether an antenuptial settlement, in the French form, followed by such a marriage only, would be holden operative in France. In this case a Marriage Contract was entered into in Paris between two English subjects, according to the formalities required by the French Law, in anticipation of a marriage to be solemnized "*suivant la loi.*" A valid English marriage

(*r*) 19 *Beavan's Rep.* at pp. 62 63.
(*s*) 18 *ibid.* p. 112.

took place at the Embassy, but no marriage ceremony took place according to the French forms and solemnities.

It was holden that the marriage "*suivant la loi*" was fulfilled by the English marriage, and *that the settlement, being to regulate an English marriage, was valid here*, notwithstanding that, according to the French Law, the marriage and the settlement might be inoperative; it was therefore decided in this case, contrary, it will be remembered, to the decision of the American Court (*t*), that English subjects, on their marriage, may stipulate that their marriage rights shall be regulated by the Law of a foreign country, and this Court will enforce such a contract.

CCCCLXXI. In a recent case the proposition—that the Marriage Contract is regulated by the Law of the domicil of the parties at the time when the contract was entered into—was laid down as an unquestionable maxim of English Jurisprudence (*u*).

CCCCLXXII. In *Duncan* v. *Cannan*, Sir John Romilly, M.R., in giving judgment, reviewed all the former decisions (*x*). He said:—"The question, as it appears to me, "may be properly thus stated:—*Did the change of domicil* "*superinduce a disability in the wife to give a receipt not* "*existing by the Scottish law? I am of opinion that it did* "*not*, and that to hold that it did, would be, in reality, to "hold that the construction of the contract is different "in England from what it is in Scotland. When these "parties entered into the marriage contract, they agreed "that the joint receipt of the wife and husband should be "a good discharge to any person who paid to them after-"acquired property of the wife. This is, in my opinion, "the effect of the contract, as established by the opinions "of the Scottish lawyers. It is, as it appears to me, a

(*t*) *Vide supra*, § cccclvii.
(*u*) *Re Wright's Trusts* (1856), 2 *Kay & Johnson's Rep.* p. 595.
(*x*) 18 *Beavan's Rep.* at p. 141.

" part of the contract, according to the construction of " the Law of the country which governs it, that the " married woman may, in this respect, act as a *feme sole*, " and give, or concur in giving, a receipt. If I am right " in considering this to be a question of construction, this " settles the matter. If the English words, 'that the " 'after-acquired property should be for the sole and " 'separate use of the wife absolutely,' had been inserted " in this contract, she could, according to the English " Law, have given a good receipt for the money, and she " might have dealt with it as she pleased, and might have " authorized it being paid to her husband. Such words " were not inserted in the contract, because they are not " words used in such instruments according to the Scottish " form; but the evidence shows that the words used in " the contract have, in Scotland, so far as regards the " extent of the interest of the wife in this property, the " same effect as would have been given in an English " settlement to the words I have above suggested, if they " had been introduced. To create a disability in one of " two parties to a foreign contract, not existing according " to the law which governs the contract, solely by reason " of the change of domicil of the contracting parties to a " country where such a disability exists, appears to me to " be contrary to the principles governing such cases. It " would be, I think, to hold that a contract is to bear a " different meaning according to the place where it is " acted upon. I do not find that any of the cases cited " lead me to the conclusion that such a disability would " be produced by such a change of domicil.

" The cases principally relied upon appear to me to " confirm this view of the case. In *Foubert* v. *Turst* (*y*), " a gentleman and lady had married in Paris, and had " entered into a Marriage Contract. It was admitted that " the custom of Paris would not follow them to London,

(*y*) 1 *Bro. Parl. Cases* (2nd ed.) p. 129.

" whither they had gone to reside; but the Court held, " that the true construction of the contract was, that the " custom of Paris should regulate the distribution of their " estate. This made the question of domicil immate- " rial, and then the Court acted upon that contract (*z*). " In a late case of *Este* v. *Smyth* (*a*), I acted on the same " principle. The case of *Lashley* v. *Hogg* (*b*) establishes " the same principle. *The Custom and Law of the Country* " *will follow the Domicil, but only where the contract of the* " *parties is silent; where the contract governs the distribution* " *or the payment, this must be the same wherever it is acted* " *upon.* The case of *Macdonald* v. *Macdonald* (*c*), which " was cited, only shows that the duties and obligations of " persons must vary with the change of domicil, but this " only so far as they are not bound by contract. *Don* v. " *Lippmann* (*d*) merely establishes this proposition, that, " though a foreign contract must be construed as it would " be in the country which governs it, the mode of enfor- " cing it must be according to the Law of the country in " which that event takes place; and that, on this prin- " ciple, the Law of Prescription obtaining in the country " where the contract was sought to be enforced, must pre- " vail; in fact, it was there held not to be a question " of construction of contract, but of the mode in which it " should be enforced.

" The case of the *Duchess of Buckingham* v. *Winter-* " *bottom* (*e*), which is peculiar, does not appear to me to " affect the general proposition I am now stating; and " the case of *Anstruther* v. *Adair* (*f*) supports the view

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(*z*) See *Westlake*, ss. 35-38.

(*a*) 18 *Beavan's Rep.* p. 112.

(*b*) Reported in the Appendix to Mr. Robertson's work on Successions.

(*c*) 8 *Court of Session Cases*, p. 830.

(*d*) 5 *Clark & Fin. Rep.* p. 1.

(*e*) 13 *Court of Session Cases*, p. 1129.

(*f*) 2 *Mylne & Keene Rep.* p. 513.

" that *the Court, administering the rights of parties under a* " *foreign contract, will give it the same effect as the Law of* " *that country would have given to it, whatever may be* " *the domicil of the parties to it*; and I acted on this view " in the case of *Este* v. *Smyth*" (*g*).

CCCCLXXIII. It may be received, therefore, as a maxim of English jurisprudence, that change of domicil does not affect the construction of an express Contract of Marriage.

CCCCLXXIV. In a later case, *Watts* v. *Shrimpton* (*h*), before the Master of the Rolls, in 1855, it appeared that an Englishwoman married a domiciled Frenchman. Articles were, previously to the marriage, executed in the English form, by which the wife became entitled to 200*l.* a year. Her husband afterwards separated from her, and subsequently the French Court condemned her for adultery. It was holden that the Contract of Marriage was English, and that the rights of the parties were to be regulated by the English Law, and *further property* of the wife having fallen into possession, and the moral conduct of both parties being reprehensible, the income of the fund was ordered to be equally divided between them.

CCCCLXXV. According to this case, property, therefore, not included in the express contract, is governed by the Law of the *actual* domicil.

CCCCLXXV.A. *Van Grutten* v. *Digby* (*i*) was the case of a marriage in France between a domiciled Frenchman and an Englishwoman. The lady's property was, previously to the marriage, settled by a marriage settlement in the usual English form. This settlement, however, was invalid by the Law of France, as wanting in the forms required by the French Law.

After the marriage, the husband filed a bill to have the

(*g*) [*Duncan* v. *Cannan* affirmed on appeal, 7 *D. M. & G. Rep.* p. 78.]
(*h*) 21 *Beavan's Rep.* p. 97.
(*i*) 31 *Beavan's Rep.* p. 561.

settlement declared invalid, and the property handed over to him as entitled thereto by the Law of France. The bill was dismissed.

CCCCLXXVI. The foregoing cases belong to the category of marriages accompanied by an express contract as to property. There can be no reasonable doubt that the same principle is applicable to property accruing to married persons which has not been the subject of express contract—the principle, namely, that the Law of the Matrimonial domicil will govern the rights of the husband and wife, as to their property (*ii*).

CCCCLXXVII. That such is the English Law seems to have been assumed by the analogy adopted in the following case, which related immediately to the ex-territorial effect of a foreign sentence in a matter of commission of bankruptcy (*k*). In this case, Lord Meadowbank observed, "I remember the judgment in *Struther's* case being pro-"nounced. I can tell your Lordships that it was a most "important case, though I thought it went a step beyond "the rules of International Law. For it was formerly a "principle that a judicial transfer only operated *intra* "*territorium*, and had no binding influence beyond it. So "much had this been the known understanding of the Law "of Scotland, that I remember struggling with difficulty "at the bar, in a case where the English assignees had "obtained a decree against their debtor, to enable them to "prevail over a subsequent arrestment. The question was, "whether the commission was a proper mode of transfer-"ring the dominion in Scotland. I succeeded in the case. "The Court held that there was a title to pursue, but that "it required the interposition of the Scotch magistrate to "give it effect; that, in short, I had a good title, if I chose

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[(*ii*) See *Collis* v. *Hector*, *L. R.* 19 *Equity*, p. 334; *De Greuchy* v. *Wills*, *L. R.* 4 *C. P. D.* p. 362.]

(*k*) *The Royal Bank of Scotland* v. *Cuthbert*, *Rose's* (*Bankruptcy*) *Rep.* vol. i. p. 481, Appendix (A.D. 1813).

"to render it effectual. I remember, I thought that it "was a difficult thing to deviate so far from principle as "to transfer property in Scotland without regard to our "own forms and rules, and without an intimation of the "assignment or anything done to attach the property "according to our own Law. But, what I yielded to, was "the consideration that it had been recognized as Law by "judgments of the Chancellor for so long a period that it "might be considered as a principle of the Law of Nations. "*Equiparating this case to the ordinary case of transference* "*by contract of Marriage, when a lady of fortune, having a* "*great deal of money in Scotland, or stock in the banks, or* "*public companies there, marries in London, the whole* "*property is, ipso jure, her husband's. It is assigned to him.* "*The legal assignment of a marriage operates without regard* "*to territory, all the world over.* Feeling this, and seeing "the predominant, the irresistible necessity, in point of ex- "pediency, of adopting the rule that Lord Hardwicke "adopted in one of the cases mentioned in the papers, I, "for one, am bent to the necessity of giving effect to the "principle, where a departure from it would be attended "with such inextricable confusion."

CCCCLXXVIII. The same principle seems to have been the foundation of the recent case of *M'Cormick* v. *Garnett* (*l*), in which it was decided that where a husband and wife are domiciled in Scotland, in which country a wife has no equity to a settlement, the English Court will order payment of the wife's legacy to an assignee of the husband.

CCCCLXXIX. There does not appear to have been any English decision upon the point, whether in the absence of an express contract (*m*), and in the event of a change of domicil, the Law of the *actual domicil*, or of the *matrimonial domicil*, should govern the property of married per-

(*l*) 5 *De Gex, M. & G.* p. 278 (1854).

(*m*) In the case of *Watts* v. *Shrimpton*, mentioned above, there had been an express contract, *vide suprà*, § ccccIxxiv.

sons, nor whether a distinction is to be made between property accruing before and after the change of domicil.

It seems to the writer of these pages, that, as to property accruing before the marriage, it must obviously be considered that the wife's rights have vested, and cannot be affected by any subsequent conduct or acts of the husband; and that the same principles will, on examination, be found applicable to property accruing after the marriage: in other words, that the reasoning of Savigny, and of the jurists who agree with him, is both superior to that of Story, and more in harmony with the English decisions which have been just mentioned (*n*).

[(*n*) In support of this opinion, see *Westlake*, s. 32 (p. 64 of edition 1880) and cases there cited.]

CHAPTER XX.

MISCELLANEOUS INCIDENTS TO MARRIAGE.

CCCCLXXX. In the last chapter, the effect of Marriage upon the property of married persons was considered: in this it is proposed to notice some miscellaneous incidents to the contract.

CCCCLXXXI. (1) Does a Change of Domicil affect the *Status* of the married parties?

"Whatever contrariety of opinion," Mr. Burge (*a*) observes, "may exist, respecting the effect of a change of "domicil on rights of property acquired under the Law of "the matrimonial domicil, there is a general concurrence "amongst jurists (*b*) in holding that, although the Law "which confers those rights, powers, and capacities, is "strictly a Personal Law, yet its influence exists so long "as the parties remain subject to it by retaining their "matrimonial domicil. When they quit that domicil, "and establish another, their *Status* is governed by the "Law of the latter, and their capacities and powers are "those which that Law confers."

CCCCLXXXII. President Bouhier (*c*) maintains an opposite opinion, on the ground that the *Status* of the wife ought not to depend on the caprice of the husband. Such

(*a*) *Comm.* vol. i. p. 253.

(*b*) *Rodenburg, De Jure*, tit. ii. pars alt. c. i. p. 105.

J. Voet, De Judiciis, lib. v. t. i. n. 101.

Boullenois, Traité &c., tome i. tit. i. c. ii. Obs. iv. p. 61.

Pothier, Œuvres, tome x. p. 3. (Introd. Gén. chap. i. ss. 10, 13.)

(*c*) *Les Coutumes du Duché de Bourgogne, avec les observations du Président Bouhier*, c. xxiii. n. 3, cited in *Burge. Comm.* vol. i. p. 257.

a doctrine, he contends, flies in the face of the rule of Law which does not allow a right once duly acquired to be taken away without the consent of the person possessed of it. It cannot be said that a wife *submits* herself even tacitly to the Law of the new domicil; she only obeys.

Merlin, in his first edition, adopted this opinion; and in his second (not a solitary instance), rejected it, and admitted that the *Status* must be governed by the Law of the actual domicil (*d*).

CCCCLXXXIII. An important case, upon the principle now under discussion, was decided in the Court of Session in Scotland, in 1846 (*e*). In this case it was sought to compel an English mother to *aliment* a child born in Scotland. The following remarks were made by the Judges as to the effect of domicil upon *Status*, and the recognition of that effect by the country in which a person, domiciled elsewhere, happened to be. The Lord President said:—"I have great difficulty, moreover, in "holding that her liability is to be determined by the Law "of Scotland; and I *am rather inclined to the opinion that* "*she has the Status of an Englishwoman, and that it is the* "*Law of the country of her domicil that must determine her* "*obligations now.*"

Lord Mackenzie, in the same case, said:—"But the "inclination of my opinion is to hold that she is not "subject to the Law of this country. The child was "certainly born in Scotland; but the mother long since "removed to England and acquired an English *Status.* "If an English couple were to come here and acquire a "Scotch domicil, they would not import the English law "of *Status* with them, with the view of excepting them "from the obligation to aliment children, imposed upon "parents by the Law of Scotland. In the case of *Maid-*

(*d*) *Merlin, Rép.* Autorisation Maritale X. § iv. (p. 243, ed. 1825). *Burge, ubi sup.*

(*e*) *Macdonald* v. *Macdonald*, 8 *Court of Session Cases*, p. 830.

" *ment*, where an English mother was sought to be made " liable to a child in aliment, according to the Law of " Scotland, the point was not argued. On the whole, I " think we ought to know what is the English Law as " to the liability of children and parents in regard to " aliment."

Lord Fullerton said:—" *It has been, indeed, contended* " *that the claim originated at the child's birth, when the* " *mother was subject to the Scotch Law, and that it remained* " *in abeyance till the circumstances of the child sanctioned a* " *claim for aliment. But the obligation to aliment is not a* " *contingent debt of this sort. There was no debt contracted* " *at birth.* The foundation of the claim is, that, after the " birth, circumstances arose which warrant a demand for " aliment; but the obligation only comes into existence at " the time when the necessity or poverty of the child re- " quires the relief. *Therefore, it is the Law of England,* " *the Law of her domicil now, which must declare the extent* " *and measure of her liability*; and if the case is to be " further proceeded with, we must take the opinion of " English lawyers as to the Law of England" (*f*).

Lord Jeffrey said:—" *The whole duties and liabilities of Personal Status are undeniably changed according to the Law* " *of every new domicil.* With regard to the subsisting " and current obligations arising from *Status*, the Law of " the country where the duties are to be fulfilled must be " clearly the Law to measure their extent; and, there- " fore, if, by the Law of England, this claim cannot be " sustained, we must refuse to give it force" (*g*).

It is important to observe that this judgment was mainly founded on the position that the obligation—on the part of the mother—to aliment, was not an obligation contracted at the *time of the birth of the child*, but arose

(*f*) *Macdonald* v. *Macdonald*, 8 *Court of Session Cases*, p. 836.
(*g*) *Ibid.* p. 837.

from *subsequent* circumstances. This decision is, therefore, not inconsistent with the doctrine presently to be considered, that the Law of the place of residence may enforce certain obligations arising out of the Marriage Contract.

CCCCLXXXIV. (2) With respect to the *obligations contracted by a wife.*

They may be contracted in a State in which her husband may not be domiciled, and by the Law of that State the wife's incapacity, or the husband's, may be greater or less than by the Law of his domicil. Here again Mr. Burge observes (*h*):—"According to the doctrine held by "all jurists (*i*), the wife retains the incapacity to which "she was subject by the Law of the husband's domicil; "and, therefore, the validity of an obligation, in respect "of her capacity, and of the nature of the authority to "be given by the husband to enable her to act, must be "determined by that Law, and not by the Law of the "place in which the obligation was contracted."

(3) With respect to *gifts between husband and wife.*

This question is also to be decided by the Law of the husband's domicil; it is a matter connected with, and dependent upon, the *Status,* and governed, therefore, by the Personal Law.

On this ground was founded an important *arrêt* of the Court of Paris (*k*). A foreigner, domiciled in France, made a gift to his wife conformably to the 1096th Article of the Code Napoléon. The Court held the gift valid, although the *lex rei sitæ* did not allow such a gift between married persons.

(*h*) *Comm.* vol. i. p. 258.
(*i*) *Rodenburg, De Jure,* tit. ii. c. i. n. 1, p. 28.
Boullenois, Traité, &c., tome ii. tit. iv. c. ii. obs. 46, p. 467.
Pothier, Traité des Obligations, par. ii. c. vi. s. 3, n. 389.
(*k*) 6 February, 1856, *Rev. Pratique de Dr. Fr.* tome i. p. 59, n. 2. *Demangeat's Essay.*

CCCCLXXXV. The old Roman Law (*l*) rigorously forbade all gifts between husband and wife as tending to substitute sordid considerations for those of love and duty, as the motive of performing the obligations of marriage.

Savigny (*m*) admits here, in exception to his general rule, that the Law of the Matrimonial domicil should prevail, that States which adopt a Law on these moral grounds are warranted in applying it to the exclusion of all other Law. If, therefore, at the period of a "*donatio inter conjuges*," their domicil be in a State which forbids it, the gift is null; but, if their domicil be in a State where it is not so forbidden, it is valid; for it cannot be said that persons, in whose Matrimonial domicil, at the time of their marriage, such a prohibitory Law prevailed, had tacitly contracted that they would never, under any circumstances, make gifts to each other. The prohibition is a simple restriction, *ab extra*, on the liberty of both parties to the contract, and not a condition to which the parties voluntarily submit themselves by the *factum* of their marriage.

On the other hand, Savigny is of opinion, with Rodenburg (*n*), J. Voet (*o*), and Meier (*p*), that this prohibitory Law is not to be applied to all *immoveable* property situate within the territory, but possessed by married persons domiciled in a country where no such prohibition prevails. The intent and object of the prohibitory Law are not to

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(*l*) "Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuato amore invicem spoliarentur, donationibus non temperantes, sed profusâ erga se facilitate."—*Dig.* lib. xxiv. t. i. 1.

"Majores nostri inter virum et uxorem donationes prohibuerunt, amorem honestum solis animis æstimantes, famæ etiam conjunctorum consulentes, ne concordia pretio conciliari videretur: neve melior in paupertatem incideret, deterior ditior fieret."—*Ibid.* t. i. 3.

(*m*) *R. R.* viii. s. 379, num. 4.

(*n*) Tit. ii. c. v. n. 1, p. 67.

(*o*) *In Pand.* xxiv. i. s. 19.

(*p*) iii. p. 44.

protect the property of married persons against injury from mutual gifts, but to maintain the purity of morals in the married state. The legislator, moreover, addresses his law to married persons dwelling within his territory, and not to foreigners.

Savigny's opinion, therefore, agrees with the decision of the French Tribunal cited in the foregoing section.

CCCCLXXXVI. (4) With respect to the *authority of the husband over the wife* (*l'autorité maritale*).

The rule laid down in general terms by jurists is that this authority is also a question of Personal Law. It is manifest, however, that the Law of the place of residence, whether it be identical or not with the Law of the domicil, must, in many instances, prevail. "Marriage is "a contract" (as has been said) "*sui generis*" (*q*); many of the obligations and rights incident to it must be governed by the public Law of the State. For instance, the question of whether any, and if any what, amount of force, control, or chastisement may be exercised by a husband to a wife, must be under the cognizance of the Law of the place of *residence*. So, too, it should seem, must be complaints as to the violation of the conditions of the marriage bond.

For instance, if the husband deserts his wife, refuses her maintenance, or ill-treats her by violence, she has a right, *jure gentium*, to redress in the tribunals of the place where they reside.

CCCCLXXXVII. So, too, it would seem that the Courts of the place of residence ought to be open to suits brought by commorant foreigners for the purpose of compelling a performance of the obligations of marriage; for instance, suits for the *restitution of Conjugal Rights*. Such seems to have been the opinion of the English Courts in the remarkable case of *Connelly* v. *Connelly* (*r*). On this

(*q*) *Edmonstone* v. *Lockhart*, cited in *Fergusson on Marriage and Divorce*, p. 399—Lord Robertson's Judgment.

(*r*) 7 *Moore's P. C. Rep.* p. 438. *Vide infrà*, chap. xx. [In *Firebrace*

ground, also, Jews, whose Marriage Contract was subject to their own peculiar Laws, and who were, in this respect, treated altogether as foreigners, have been permitted to obtain redress for the violation of the obligations of the Marriage Contract in the ordinary Matrimonial Courts of the country (*s*).

CCCCLXXXVIII. Whether the principle that the Law of the place of residence is applicable to the enforcement of the rights and obligations, and to the general protection of married parties, can be so far extended as to include the power either of absolutely or of partially annulling the contract, will be considered in the following Chapter upon the effect of Foreign Divorces.

CCCCLXXXIX. The domicil of the wife is, as has been seen, as a general rule, for all purposes identical with the domicil of the husband. How far the misconduct of the husband may affect this general rule has been already considered (*t*).

CCCCXC. [is omitted as relating to old English Law, now altered by recent legislation.]

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v. *Firebrace* (*L. R.* 4 *P. D.* 63) Sir J. Hannen refused this relief to a wife whose husband before suit had quitted the jurisdiction. "The domicil of the wife," he said, "is the domicil of the husband, and her remedy for matrimonial wrongs must be usually sought for in the place of that domicil. It is not however inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled. What these cases may be it is unnecessary now to determine . . . but it appears to me that the particular relief now sought by decree for restitution of conjugal rights does *not, where the husband had quitted the jurisdiction before suit*, present an exception to the rule above stated."

See *Niboyet* v. *Niboyet*, *L. R.* 4 *P. D.* 1; *et vide post*, §§ ccccxcv—ccccxcviii.]

(*s*) *Lindo* v. *Belisario*, 1 *Haggard's Consist. Rep.* p. 216.
D'Aguilar v. *D'Aguilar*, 1 *Haggard's Eccl. Rep.* p. 773.

(*t*) *Vide suprà*, chapter viii. [*et infrà*, § dvi. B.].

CHAPTER XXI.

DIVORCE—FOREIGN SENTENCE.

CCCCXCI. THAT portion of Private International Law which relates to Divorce ought, perhaps, strictly speaking, to form a part of the consideration of the effect given by Comity to the sentences of Foreign Tribunals (*a*), a subject which is treated of in a later part of this volume. But it seems more practically convenient to examine this question in connection with the Law on Marriage.

CCCCXCII. The Contract of Marriage differs from all others (*b*) in this, among other incidents, that it cannot be broken at the mere will and pleasure of the parties who entered into it (*c*).

In every Christian State, which permits either the entire or the partial dissolution of the Marriage Bond, the intervention of the public authority, in the shape of a judicial sentence, is necessary.

CCCCXCIII. Christian States have been unanimous in recognizing, subject to the limitations and exceptions which have been mentioned, the general principle, that Marriage celebrated according to the *lex loci contractûs* is

(*a*) So *Merlin* mentions under *Questions de Droit*—Divorce, viii. : "Les tribunaux Français peuvent-ils annuler un Divorce prononcé par jugement en pays étranger?" but refers to *l'article* "Jugement," xix.

[(*b*) "Marriage . . . is indeed based upon the contract of the parties, but it is a *status arising out of a contract*, to which each country is entitled to attach its own conditions, both as to its creation and duration." Per Sir James Hannen, in *Sottomayor* v. *De Barros*, *L. R.* 5 *P. D.* at p. 101.]

(*c*) See note at the end of this chapter as to the Roman Law on Divorce.

valid everywhere. But Christian States have been and are far from unanimous in recognizing the principle that a dissolution of the contract pronounced by the tribunal of one State is valid in another. Marriage has been said to be a contract *juris gentium*, but the dissolution of it has not been considered as *jure gentium* binding on all States.

It is, indeed, a question of private right, but one indissolubly united with public order. The religious and moral elements which are the basis of the Marriage Contract (*d*) bring the Law relating to its dissolution under the category of those exceptional restrictions to the admission of Foreign Law which have been mentioned at the outset of this volume (*e*). The question is one more of *Status* than of *Contract*.

CCCCXCIV. Upon this difficult and most important matter there has obtained, and still obtains, great and lamentable discord, both in the opinions of jurists and the decisions of Courts.

CCCCXCV. This discord has principally appeared in the consideration of the following questions:—

1. What *forum* ought to take cognizance of the question of Divorce—the *forum* of the Matrimonial domicil—of the Actual domicil—of the husband only—or of the wife only—or of either?

2. What Law ought the *forum*, if it entertain the suit, to apply? The *lex fori*, or that of the matrimonial or the actual domicil? If the latter, that of the husband or the wife?

(*d*) It is said by a judge of the United States of North America, that "regulations on the subject of Marriage and Divorce are rather parts of the *criminal* than the *civil* code, and apply not so much to the contract between the individuals as to the personal relation resulting from it, and to the relative duties of the parties, to their standing and conduct in the society of which they are members; and these are regulated with a principal view to the public order and economy, the promotion of good morals, and the happiness of the community."—Mr. Justice Sewell in *Barber* v. *Root*, 10 *Mass. Rep.* at p. 270.

(*e*) *Vide suprà*, §§ xii, xiii, xiv, xv.

3. Ought a State, the Law of which does *not* permit divorce, to recognize a divorce, decreed in another State between persons belonging to that State?(*f*)

4. Ought a State, the Law of which *does* permit divorce, to recognize a foreign divorce between its own subjects, or between one of its own subjects and a foreigner?

5. Ought a State, the Law of which permits divorce upon certain grounds, to recognize a foreign divorce which had been obtained upon other grounds by its own subjects?

CCCCXCVI. (1) Savigny (*g*) lays it down as an incontrovertible proposition that the only competent *forum* is that of the *actual domicil* of the husband; and the only Law to be applied, that of his domicil. His opinion is founded on considerations of the moral element of laws relating to Divorce, which clothes them with a rigorous and positive character; he considers them as belonging to that class of laws which appertains to the public policy of each State; laws which each State therefore enacts without regard to other States.

It was upon this principle that when, in 1814 and 1816, Prussia introduced her Code for the first time into her newly acquired provinces beyond the Elbe, it was ordered that, with respect to existing marriages, divorces should be governed by this Code, and not by the Law in force when the marriage was celebrated: the order was indeed accompanied by an exception (praised by Savigny on account of its justice and moderation) that a divorce should

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(*f*) Mr. Burge says of Marriage: "As its dissolubility or indissolubility is no part, express or implied, of the contract of marriage, but is an incident to the *status* of husband and wife after it has been constituted by such a contract, it must be determined by the law to which the *status* is subject."—*Comm.* vol. i. p. 688.

Cf. *ib.* pp. 102, 244.

(*g*) *R. R.* viii. s. 379, num. 6, s. 396, s. 399.

The decision in *Yelverton* v. *Yelverton*, 1 *Swab. & Tristr. Rep.* p. 574 (1859), by the Judge Ordinary, in England, arrives at Savigny's conclusion, through other premisses—viz. "actor sequitur forum rei."

not be allowed in those cases in which the fact constituting the ground of the divorce, and admitted to do so by the Code, should have taken place under the jurisdiction of the Foreign Law, which did not recognize this fact as constituting a ground of divorce.

When the French Code was introduced into Belgium and Piedmont, during the period of their incorporation into the French Empire, it was decided by the tribunals of these States, that a divorce ought to be granted under the provisions of that Law on account of facts which had happened previously to the introduction of it (*h*).

CCCCXCVII. Savigny's position rests, no doubt, upon sound principle, and is supported by the best legal analogies; but it requires, nevertheless, explanations, and cannot in justice be always, and in all circumstances, rigorously applied.

In the first place, what is meant by the *actual* domicil of the husband?—a *forensic* domicil; that is, one more easily acquired than a *testamentary* domicil—one which certainly does not require the intention to remain permanently in a particular place, and yet, perhaps, one which is not satisfied by a mere residence adopted for the purpose of founding a jurisdiction; to establish, indeed, this distinction in practice is, in the absence of any positive law on the subject, extremely difficult.

What are the *criteria* which establish a *bonâ fide residence* as distinguished from domicil (*i*)? Where are they laid down?

It is not easy to answer these questions. The French Law, as will presently be seen, attaches great importance to foreign *naturalization*, admitting that in such cases the *Status* of the Frenchman is lost.

(*h*) *Merlin, Rép.* Effet Rétroactif, III. § ii. art. vi. *Westlake*, s. 48.

(*i*) See *Yelverton* v. *Yelverton*, 1 *Swabey & Tristram Rep.* p. 574 (1859).

In Scotland a positive law specifies the duration of residence which renders a foreigner amenable to a suit for divorce in a Scotch Court (*j*). Here the distinction between *domicil* and *residence* is remarkable. A plea that the residence was *in fraudem legis domesticæ* is inadmissible in Scotland, for by specifying the duration of residence it shuts out all consideration of *Foreign domicil* (*k*).

In England a positive law requires a certain amount of residence before a marriage can be solemnized by Episcopal license or banns, but no positive law as to the time of residence requisite to found the jurisdiction of an English Court. The subject is at present in a state of much perplexity and uncertainty in England; but, according to a judgment (*kk*) of the Divorce Court, the residence of the wife alone is insufficient to found the jurisdiction of an English Court in a suit against a husband, who has not been and is not residing within the limits of the State to which the Court belongs. It should be added that in this case the marriage also had been contracted out of England.

In the United States of North America a contrary doctrine has been maintained by their tribunals; and surely such a doctrine may be maintained with no small show of reason.

The general doctrine, that the domicil of the wife is legally that of her husband, rests upon the basis that it is the legal duty of the wife to dwell with her husband wherever she goes; but if he commits such an offence against the marriage state as renders her cohabitation morally, and perhaps also physically impossible, he has

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(*j*) After forty days' residence, a citation may be legally served on his *dwelling-place*; but he may be *personally* cited the moment he sets foot in Scotland.—*Utterton* v. *Tevsh*, *Fergusson's Consist. Rep.* p. 23.

(*k*) See *Geils* v. *Geils*, 1 *Macqueen's H. L. C.* p. 275.

(*kk*) *Yelverton* v. *Yelverton*, *ubi suprà* [cited more at length *infrà*, § dvi.A. See further § dvi.B, and the cases there cited and referred to.]

destroyed the basis upon which the general doctrine rests, and has entitled, or rather compelled, her to establish, *for the purpose of obtaining justice against him at least*, if not a separate domicil, in the full sense of the term, a separate *forensic domicil*; otherwise the husband may easily take, what all sound jurisprudence abhors, advantage of his own wrong. He deserts or ill-treats his wife, or pollutes with adultery his marriage-bed, and betakes himself to a country where no tribunal taking cognizance of such offences exists, and leaves his wife to starve in ignominy and wretchedness in a country which has tribunals which take cognizance of such offences against the marriage state, but which on a theory, the basis of which is wanting in the particular case, refuses to administer justice to her, even though its own subject (*l*).

CCCCXCVIII. According to the Law of France, M. Fœlix tells us, the French wife married to a foreigner may institute a suit for nullity of marriage before the French Tribunals. He rests this proposition on the due interpretation of the 14th Article of the Code (*m*). The foreigner who contracted marriage with her bound himself at the same time by the obligations incident to that contract; among them was the obligation of liability to a suit for nullity of the contract itself.

M. Demangeat thinks that the better argument is that the wife who institutes such a suit sustains, by the fact of its institution, the proposition that she has never lost her

(*l*) *Vide suprà*, § lxxxviii. *Dolphin* v. *Robins*, 7 *H. L. Cases*, p. 390, and the leading American case, *Harteau* v. *Harteau*, 14 *Pick.* (*Amer.*) *Rep.* p. 181. See, too, *Bishop on Marriage and Divorce*, vol. ii. ss. 128-131; *Lord Eldon's* remarks in *Tovey* v. *Lindsey*, 1 *Dow's Rep.* pp. 132-138; the reasoning of *Lord Lyndhurst* and *Lord Brougham* in *Warrender* v. *Warrender*, 2 *Clark & Finn. Rep.* p. 488; [*Le Sueur* v. *Le Sueur*, *L. R.* 1 *P. D.* p. 139; and *Briggs* v. *Briggs*, *L. R.* 5 *P. D.* p. 163.]

(*m*) *Code Civil*, Art. 14: "L'étranger même non résidant en France pourra être cité devant les tribunaux, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des Français."

character of a Frenchwoman, and, therefore, is entitled to invoke the 14th Article of the Code (*n*).

CCCCXCIX. (2) As to the Law which the *forum* ought to apply.

It seems clear upon all sound principles of jurisprudence that the *forum* can only administer the *lex fori* (*o*) upon Divorce.

In the first place, the parties to the Marriage Contract derive from it no right to a divorce: it is not, as in the case of contract for transfer of property, a question of rights already existing before the contract is brought into a court of justice (*p*). In the second place, all remedies, as will be seen hereafter, depend on the *lex fori*, not on the *lex loci contractûs*.

The notion which appears to have been entertained by some of the Scotch judges (*q*) that the Scotch Tribunals might decree an English divorce *a mensâ et toro*, a remedy unknown to Scotch Law, to English subjects resident in Scotland, was wisely overruled by the Superior Court.

This notion of the Scotch judges was that a *less* remedy than that allowed by the *lex fori* could be administered. The notion that a *greater* remedy than that allowed by the *lex fori*, *i.e.* a divorce *a vinculo* by the tribunal of a State which allowed only a divorce *a mensâ et toro*, could be granted, on the ground that the Law of the Matrimonial domicil allowed the former, remains to be promulgated. The true question is whether the *lex fori* is to be applied at all, not whether any other Law be applicable.

D. (3) (*r*) To this question the answer seems on principle to be clearly in the affirmative; the foreigners, in this hypothesis, come into a Foreign State with a particular *Status*

(*n*) *Fœlix*, liv. ii. tit. ii. s. 175 (p. 337 *Demangeat's* edit.), note (*b*).

(*o*) This proposition is strongly affirmed by Mr. Justice Sewell, in *Barber* v. *Root*, 10 *Mass. Rep.* p. 265.

(*p*) See this well stated in *Westlake*, s. 48.

(*q*) *Duntzee* v. *Levett*, *Fergusson's Consist. Rep.* p. 68.

(*r*) *Vide antè*, § ccccxcv.

affixed to them by the foreign Law of the State to which they belong. The only ground upon which this *Status* could be refused recognition would be, that it was contrary to the public policy or morality of the new State; but it seems clear that the residence in that State of *two* foreigners, as single persons, is not a case of this description: what the former *Status* of these parties was is a matter of private history in no way affecting the State in which they happen to be now resident.

The question as to the past arises on the attempt of either foreigner to re-marry, which, it will be seen, the French Law [did] not allow (*s*).

To the converse of this case, namely, the *Status* of polygamy among foreigners resident in a Christian State, very different considerations apply. The case, however, it must be admitted, is one of no mean difficulty to a Christian State which possesses Oriental dependencies and recognizes in them Oriental habits and laws (*t*).

Nor is the question of the operation of a Divorce granted by a *third* State upon foreigners resident in another State concluded by the observations which have been made (*u*).

(*s*) *Wächter* says, "If a citizen of our State marries a divorced person belonging to another State, our State ought to decide according to the Laws of the foreign State, whether the divorce were invalid or not, but, according to the Laws of our own State, whether it was competent to our citizen to marry a divorced person." See § 23, nu. 2, of his article on "Die Collision der Privatrechtsgesetze," &c., *Archiv für die civil. Praxis*, (Band XXV. 187).

(*t*) The French Law, according to *Merlin*, would permit the Mussulman's polygamy with his own countrywomen, but not with Frenchwomen, on the ground that the *personal statute* rendered their marriage unlawful. (*Questions de Droit*, Divorce, XIII. p. 370.) *M. Demangeat* thinks that the Mussulman could not contract such a marriage, even with his own countrywomen, *in France*; and as to his marriage in his own country, "Je n'oserais pas dire que nous devons les considérer, sauf la première, comme absolument non avenues: tout au moins faudrait-il voir là en quelque sorte des mariages putatifs, et appliquer par analogie les art. 201 et 202: si, par exemple, la question de légitimité des enfans se présentait devant nos tribunaux."

(*u*) See in next chapter, Lord Stowell's remarks on this head.

DI. (4) This is the question (*x*) which has raised the fiercest and most important controversy; States have refused to recognize Foreign Divorces, on the ground that the *lex loci contractûs* governs the Contract of Marriage; and that indissolubility is of the essence of that contract; and also on the ground that such recognition would be contrary to the fundamental policy of the realm.

States have recognized such divorces on the ground that they relate to a question of *Status* not of *contract*, and that the Law of the actual domicil governs questions of *Status*.

DII. In France, the Law of May 8, 1816, [now repealed, rendered marriages indissoluble; but the right to marry again was conceded (*y*) to persons divorced during the interval between the passing of the Law of September 20, 1792, which authorized Divorce (*z*), and that of the Law of May, 1816, which for the time abolished it. At present, by the Laws of July 27, 1884, and April 18, 1886, the Articles relating to Divorce, embodied in the Code in 1803 and abrogated in 1816, stand revived, with some modifications, and with the important excision of the right to apply for a divorce on the ground of mutual consent.]

The use which Merlin, for the purpose of solving the problem now before us, makes of [the fact of the concession, before referred to, of the right to marry again] is remarkable. It proves, he says, that the legislature of France did not consider the divorces decreed during the interval above mentioned, as "*nuls dans le for intérieur*," that is, as contrary to the immutable laws of morality.

The Law of Prohibition was therefore to be construed

(*x*) *Vide antè*, § cccxcv.

[(*y*) Not without a struggle. A Bill, forbidding divorced consorts, whilst both lived, to marry anybody except each other, was presented by the Crown, and in December 1816 passed by the Peers, but was dropped in the Chamber of Deputies. *Locré, Législation*, tome v. p. 420.]

(*z*) "Thereby reviving," Merlin says, "the *old* Law of France."—*Qu. de Droit*, Divorce, XII.

as affecting French persons only—as enacting an *impedimentum personale*, not *generale* (*a*).

Merlin, therefore, was very strongly of opinion that an Englishwoman duly divorced in her own country, might lawfully marry, in France, a Frenchman, during the lifetime of her former husband, upon just the same principle as a Frenchwoman divorced before the Law of 1816, might lawfully re-marry during the lifetime of her former husband. Merlin, however, admitted that the French tribunals had very solemnly decided the reverse. Sir John Milley Doyle had been divorced by an act of the English Legislature. His divorced wife sought to be married, in France, to a Frenchman. The *Maire* refused to marry these parties. They had recourse to the *Tribunal de Première Instance du Département de la Seine*, which affirmed the *Maire's* refusal. They appealed to the *Cour Royale*, of Paris, which affirmed the sentence of the inferior Court (*b*).

(*a*) But *M. Demangeat* says, "Il suffit de répondre que le législateur de 1816 ne pouvait pas tenir pour non avenus les divorces prononcés antérieurement entre Français, tandis que la France est toujours libre de ne pas admettre chez elle l'application d'une loi étrangère. De plus dans un cas le scandale ne pouvait se produire que pendant un temps limité à partir de 1816, tandis que dans l'autre il pourrait se produire indéfiniment, tant qu'il restera dans le monde une législation qui consacre le divorce."—*Revue Pratique de Dr. Fr.* t. i. p. 57, n. 1.

(*b*) The judgment of the first French Court is as follows:—"Attendu que, si le mariage, sous le rapport de la capacité des contractans et des formalités qui doivent y être observées, est régi par la législation du pays dans lequel il est contracté, il est régi, quant aux effets qu'il produit sous le rapport de l'état des personnes, par les principes du droit naturel et du droit des gens;

"Que c'est par cette raison que les étrangers mariés, en suivant les lois et les usages de leurs pays, jouissent en France de l'état d'époux, et leurs enfans de l'état d'enfans légitimes;

"Qu'à la différence du mariage, le Divorce n'est pas admis par toutes les nations; que même, parmi celles qui l'ont autorisé, ses effets varient suivant les différentes législations: les unes déclarant indistinctement les deux époux capables de contracter un nouveau marriage; les autres, au contraire, donnant cette faculté à l'époux innocent, et la refusant à l'épouse coupable;

"Attendu que la loi civile, en France, dispose qu'on ne peut con-

On the ground above mentioned, and solely on that ground, Merlin maintained that both judgments enunciated bad law.

M. Demangeat disagreed with Merlin, and agreed with these decisions: he [considered that it was] clear law, that a foreigner divorced in his own country could not re-marry in France, during the lifetime of his wife (*c*).

DIII. Merlin (*d*) propounds, among others, the following questions, on the subject of Foreign divorce, [under the Law prior to 1884.]

i. If two French persons, subject as such to the Law rendering marriage in France indissoluble, leave their country and become naturalized in a State which permits divorce, can they dissolve their marriage by means of a divorce founded on mutual consent?

ii. Can one of these persons institute a suit against the other for the purpose of obtaining a divorce?

iii. Can one of them found his application for a divorce upon facts which happened before his naturalization, and that of the other party to the marriage contract?

iv. If a husband alone become naturalized in a foreign State, may he obtain a divorce from his wife by mutual consent?

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tracter un nouveau mariage avant la dissolution du premier, et que la loi Française ne reconnaît plus le Divorce comme un moyen de dissolution de mariage;

"Attendu qu'il suit de là qu'une personne engagée dans les liens d'un premier mariage, même contracté en pays étranger, ne peut, à la faveur d'un Divorce que la loi Française ne reconnaît pas, et dont les tribunaux Français ne sauraient apprécier les effets, contracter un second mariage en France;

"Qu'ainsi le maire du troisième arrondissement de Paris, en refusant de passer outre à la célébration du mariage de Mary Bryan avec le Sieur Mansion, n'a fait qu'une juste application de l'Art. 147 du Code Civil;

"Le tribunal déboute Mary Bryan et le Sieur Mansion de leur demande. . . . ."—*Merlin, Qu. de Droit*, Divorce, XIII.

(*c*) 'La jurisprudence paraît bien fixée en ce sens' (*Dev.-Car.* 49, 2, 11).—*Revue Pratique de Dr. Fr.* t. i. p. 57.

(*d*) *Qu. de Droit*, Divorce, XI.

v. May he, being alone naturalized, obtain a divorce [for cause] ?

Merlin answers the two first questions unhesitatingly in the affirmative. It is not, he says, the Law at the time the marriage was contracted, but the Law at the actual moment of the dissolution (*loi du moment actuel*), which governs the question.

As the Law of a particular period (*loi du temps*) has no effect on the past, so the Law of a particular place (*loi du lieu*) (*e*) has no operation beyond the limits of the State which enacts it. The Law of the new State in which they are naturalized has the same effect upon their marriage as a new Law in their old country, passed subsequently to their marriage, would have had upon it.

The third question he answers equally in the affirmative (*f*).

The fourth and fifth questions he has unhesitatingly answered in the negative. It is true, he says, that there is a general maxim that the wife follows the condition of the husband, but it would be a great error, he adds, to infer from this maxim the consequence that a woman who has either become French by marriage, or was born French, can lose her *status* and quality as a Frenchwoman, by the naturalization of her husband alone.

Equally erroneous would be a similar inference from the doctrine, that the wife has no other domicil than that of her husband; Laws relating to *status* and *capacity* are not governed by the mere Law of Foreign domicil; apart from foreign naturalization, it is presumed, Merlin means.

DIV. It has become the clear and settled doctrine, in spite of one or two judgments to the contrary, of the United States of North America (*g*), that their tribunals are com-

(*e*) It is not improbable that this passage in Merlin may have suggested to Savigny the arrangement of his eighth volume—the work so often referred to in these pages.

(*f*) As he had previously done in his *Répertoire de Jurisprudence* under the title "Effet rétroactif," III. § ii. Art. 6.

(*g*) *Bishop*, vol. ii. ss. 141 *et seq.*
Story, s. 230 *a*.

petent to decree divorces without reference to the Law of the place in which the marriage was contracted, or to the Law of the original matrimonial domicil.

In consistency with this doctrine, it appears that they recognize a Foreign divorce of American subjects (*h*).

DV. The Scotch Courts hold the same doctrine. Divorce, they say, relates to a matter of *Status*, and it is the duty and right of each country to decide—without reference to the *lex loci contractûs*, or the domicil, or the allegiance of the married parties—upon questions of *Status* simply as questions affecting the public welfare and order (*i*). It seems difficult to say how this proposition can be maintainable with respect to two foreigners entering Scotland for a temporary object, and that object the defeating the Laws of their own domicil, such foreigners meaning to return, and actually returning as soon as they have effected this object, to their own country.

But so the Scotch Superior Courts have ruled; and there has been no appeal from this ruling to the House of Lords, though the English cases hereafter mentioned show that, out of Scotland, or at least in England, these decisions would not be respected. Nevertheless, the House of Lords, sitting as an Appellate Scotch Court, *might* sustain the validity of a Scotch divorce of an English marriage for Scotch purposes, and yet refuse to sustain it for English purposes, sitting as an Appellate English Court (*j*). It scarcely required the great powers of Lord Lyndhurst (*k*)

(*h*) Chief Justice Gibson's judgment in *Dorsey* v. *Dorsey*, 7 *Watts' (Amer.) Rep.* p. 349; *Maguire* v. *Maguire*, 7 *Dana (Amer.) Rep.* p. 181.

(*i*) "We give the remedy of Divorce for adultery," said the Scotch judge, Lord Glenlee, "because the parties are husband and wife, and not with relation to the constitution of Marriage."

[(*j*) See now *Harvey* v. *Farnie*, *L. R.* 8 App. Ca. p. 43, cited *infrà*, § dxxi. A.]

(*k*) "It must be admitted that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives; for, having been

to display the disgraceful consequences of this unseemly conflict between the two portions of the same empire.

DVI. Scotland is, of course, bound, on her own principles of jurisprudence, to recognize the validity of a foreign divorce between Scotch persons; but with respect to England, the decisions upon the subject of foreign divorces are so remarkable, and the recent change of her domestic Law is so important, that it is proposed to consider this subject separately in the following chapter.

DVI.A. But with respect to the power of English Courts to entertain suits for dissolution of Foreign Marriages, the following conclusions have been arrived at:—

When the domicil of the parties is English, the jurisdiction of the Court is founded, though the marriage and the adultery may have taken place abroad (*l*).

Therefore, where the parties to a suit for dissolution of marriage were British subjects, and had their legal domicil in England when the adultery was committed, and when the petition was presented, but the marriage and the adultery

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divorced in Scotland, he may again marry in that country; he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England: again, send him to Scotland, and his Scottish wife may proceed, in the Courts in Scotland, for breach of the marriage contract entered into with her in that country.

"Other various and striking points of anomaly, alluded to by my noble and learned friend, are also obvious in the existing state of the laws of both countries; but, however individually grievous they may be, or however apparently clashing in their principles, it is our duty, as a Court of Appeal, to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration; leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy by improved legislation."—*Warrender* v. *Warrender* (1835) (Judgment of Lord Lyndhurst), 2 *Clark & Finn. Rep.* p. 561.

(*l*) *Ratcliffe* v. *Ratcliffe and Anderson*, 1 *Swabey & Tristram Rep.* p. 467; 29 *L. J.* (*Matr. Cases*), p. 171.

relied upon took place in the East Indies, it was holden that the Court had jurisdiction to entertain the suit (*m*).

D., a natural-born English subject, married C., an Englishwoman, in England. He afterwards left her, acquired a domicil in the United States, and intermarried there with E. C. petitioned for a dissolution of marriage. It was holden, first, that C., being a native-born Englishwoman, was entitled to present her petition (*n*); and it was holden, secondly, that D., being a natural-born English subject, could not shake off his liability to the authority of the laws of his native country; and the Court pronounced for the jurisdiction, and dissolved the marriage (*o*).

C., a natural-born Englishwoman, married B., in England, and lived with him, partly in England, and partly in Ireland: in the latter country they stayed on one occasion with B.'s father; on another, at a house which B. himself was occupying. Cruelty was proved both in England and Ireland. The citation was served on B. in England, where he was then living. He did not appear. It was holden, that C. was entitled to present her petition, and that it did not so distinctly appear that B.'s domicil was Irish as to oblige the Court to consider whether its jurisdiction over a foreigner could be maintained, and the Court pronounced for the jurisdiction (*p*).

Y., whose domicil of origin was Ireland, came over to England when a minor, for the purpose of receiving a military education, obtained a commission in the Royal Artillery, and was afterwards stationed in Scotland. The head-quarters of the Royal Artillery have been always in England. He subsequently married in Scotland L., whose

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(*m*) *Ratcliffe* v. *Ratcliffe and Anderson*, 1 *Swabey & Tristram Rep.* p. 467; 29 *L. J.* (*Matr. Cases*) p. 171.

(*n*) *Deck* v. *Deck*, 2 *Swabey & Tristram Rep.* p. 90; 29 *L. J.* (*Matr. Cases*) p. 129.

(*o*) *Ibid.*

(*p*) *Bond* v. *Bond*, 2 *Swabey & Tristram Rep.* p. 93; 29 *L. J.* (*Matr. Cases*) p. 143

domicil of origin was England, and was afterwards re-married to her in Ireland, according to the rites of the Roman Catholic Church. The parties cohabited together at various places in Scotland, England, and France until 1858, when Y. deserted L. in France, and returned to Scotland, where he had since remained, refusing to cohabit with L.; and subsequently, in Scotland, married another woman. It was holden, in a suit by L. for restitution of conjugal rights, that as Y. was a foreigner by origin, had never acquired an English domicil, and had never resided in England except temporarily, and was not in England at the commencement of the suit, he was not subject to the jurisdiction of the Court (*q*).

When a husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition, and the wife appeared and submitted to the jurisdiction of the Court, the full Court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and on the Continent (*r*).

It has been further decided that the Court has jurisdiction to enquire into the validity of a marriage in England between foreigners domiciled abroad at the time of the marriage (*s*).

A. and B., domiciled French subjects, of the respective ages of 22 and 29, were married by license in England, in June 1854. On the following day they returned to Paris. The marriage was never consummated. In December 1854 a decree was made by the Civil Tribunal of the First Instance for the Department of the Seine, annulling this marriage, by reason that it had been celebrated without the publications prescribed by the French Law and with-

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(*q*) *Yelverton* v. *Yelverton*, 29 *L. J.* (*Matr. Cases*) p. 34; 1 *Swabey & Tristram Rep.* p. 574.

(*r*) *Callwell* v. *Callwell and Kennedy*, 3 *Swabey & Tristram Rep.* p. 259.

(*s*) *Simonin* f. c. *Mallac* v. *Mallac*, 29 *Law Journal* (*Matr. Cases*) p. 97; 2 *Swabey & Tristram Rep.* p. 67.

out the parties having sought or obtained the consent of their parents; and more especially, that the parties, in coming to England, had a formal intention to evade the Laws of France. In 1857, A. came to reside permanently in England, and in 1859 petitioned the Court to annul the same marriage with B. B. was personally served at Naples with a copy of the citation and of the petition, and did not appear. It was holden, that as there was nothing contrary to natural justice in calling upon a respondent to have the validity or invalidity of a supposed contract ascertained and determined by the Tribunal of the country where it was entered into, the Court of Divorce was competent to entertain such a suit (*t*).

[DVI.B. In *Le Sueur* v. *Le Sueur* (*tt*) the parties were married and cohabited in the island of Jersey, to which the English Divorce Acts do not apply. After living some years in Jersey the husband committed adultery, deserted his wife, and went to live in the United States. The wife came to England, where her husband had never acquired a domicil, and, having there established herself, brought a suit for dissolution of marriage.

Sir R. Phillimore in the course of his judgment observed: ✓
" Upon the whole I am disposed to assume in favour of
" the petitioner the correctness of the opinion that desertion
" on the part of the husband may entitle the wife, without
" a decree of judicial separation, to choose a new domicil
" for herself; and in coming to that conclusion I am aware
" that I am going a step further than judicial decisions
" have yet gone. The question remains: Is it competent
" to the wife to make the husband amenable to the *lex fori*
" of her new domicil?"

After reviewing the authorities, the judge continued:
" In the case before me the wife is suing her husband not
" in the tribunal of the place of his original domicil, or of

(*t*) *Vide suprà*, § ccccxxxv.A.
[(*tt*) *L. R.* 1 *P. D.* p. 139.]

" the marriage (according to the law of which, it is not " immaterial to remark, the bond was indissoluble), or of " the *delictum*, or of his residence, or of his acquired " domicil, but in a tribunal to which he has never been " subjected by any act of his own."

The petition was dismissed.

The question in *Niboyet* v. *Niboyet* (*u*) was whether the English Court could receive a wife's petition for divorce in a case where the wife, being originally English, had married a Frenchman at Gibraltar in accordance with the rites of the Church of England. The husband, being in the consular service of France, resided with his wife in several places and ultimately in England, but never lost his French domicil. Her petition alleged that he had been guilty of desertion, and of adultery in England. The Court of Appeal (James and Cotton, L. JJ., Brett, L. J., *dissentiente*), reversing the decision of the Court below, held that on the true construction of the English Divorce Act of 1857 (20 & 21 Vict. c. 85) there *was* jurisdiction to receive the petition and, if it were proved, to decree a dissolution. This case, it will be observed, differs from *Le Sueur* v. *Le Sueur* in that the tribunal resorted to was that of the country in which the respondent had for several years resided and in which the matrimonial offence had been committed. (*v*)]

DVII. (5.) As to the fifth and last question (*w*), the answer must depend upon the nature of the theory which the State applies to foreign divorces.

A State which held that the incapacity to be divorced, except for reasons admitted by the original Matrimonial domicil, was of the nature of a *personal statute*, ought

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[(*u*) *L. R.* 3 *P. D.* p. 52; 4 *P. D.* p. 1.

(*v*) See also *Firebrace* v. *Firebrace*, *L. R.* 4 *P. D.* p. 63, cited *antè*, § cccclxxxvii. *Santo Teodoro* v. *Santo Teodoro*, *L. R.* 5 *P. D.* p. 79; and *Scott* v. *H. M. Attorney-General*, *L. R.* 11 *P. D.* p. 128, may also be referred to.]

(*w*) *Vide suprà*, § ccccxcv.

certainly to hold a foreign divorce on any other grounds than those admitted by the original Matrimonial domicil, to be null and void. So a State which holds that a divorce is a matter affecting public order and morality, is not bound to recognize a foreign divorce between its subjects founded upon reasons which it had not sanctioned by its own jurisprudence, whether these subjects had or had not been, at the time of obtaining the foreign divorce, domiciled in the State which granted it.

On the other hand, a State which does *not* hold the doctrine of the *personal statute* above mentioned, and which does *not* hold that divorce is such a question of public order and morality that no change of domicil can give a foreign State jurisdiction over it, ought to recognize the sentence of a foreign State over persons at the time domiciled within its territory, though her own subjects, and though she does not sanction the grounds of that divorce by her domestic Law.

DVIII. There are some miscellaneous points, the notice of which may not unfitly close this chapter.

1. The English, Scotch, and North American United States Courts agree in the doctrine, that the place in which the offence was committed (*locus delicti*), whether in the State in which the case is brought, or in a foreign State, is immaterial (*x*).

2. Whether the domicil of the parties, at the time the offence was committed, be or be not immaterial, is a more disputed question (*y*). But the more generally received doctrine in the three States which have been just mentioned, is in favour of the immateriality of *this* domicil. The question has been more agitated in the North American United States than in England and Scotland; but it

(*x*) *Bishop on Marriage and Divorce*, vol. ii. s. 171. [The judgments in *Le Sueur* v. *Le Sueur* and *Niboyet* v. *Niboyet* both allude to the *locus delicti*, but do not treat it as a fact of much weight.]

(*y*) *Bishop, ibid.* ss. 172-177.

has, as Mr. Bishop observes, seldom been matter of direct judicial discussion (*z*).

3. It seems clear, that States which recognize the validity of a foreign divorce, must recognize the incidents to it, such especially as its effects upon personal and real property.

The effect upon the former ought to be the same with that on the personal property in the State which decreed the divorce.

The effect upon the latter must depend upon the *lex rei sitæ*, according to the prevalent doctrine as to real property.

If the *lex rei sitæ* visits divorce with certain consequences, and recognizes a foreign divorce, it ought to ascribe the same effects to it as to a divorce by the Domestic Law (*a*).

4. Where an Englishman married a Frenchwoman, and they resided in France, where their children were born; and suits were instituted between them in both countries and were compromised by an agreement, part of which was that the wife would facilitate proceedings for a divorce, and another part was that one of the children should remain with the mother, and a third part related to the payment of an allowance to the wife: it was holden by an English Court, that assuming the contract to be enforceable by French Law, and that the parts of it invalid by English Law had been performed in France, nevertheless no part of it could be enforced by English Law (*b*).

(*z*) *Ibid.* s. 176. [Mr. Bishop's conclusion (s. 172) is as follows:—"The place of the parties' domicil at the commission of the offence is immaterial to the jurisdiction. The Courts of the new domicil can dissolve the marital status as well for what transpired before the change as after."]

(*a*) Cf. *Story*, s. 230 *b*.

(*b*) *Hope* v. *Hope*, 8 *De G., M. & G. Rep.* p. 731; *et vide suprà*, § xviii.

NOTE TO CHAPTER XXI.

THE ROMAN LAW ON DIVORCE.

The history of the Civil Law of Rome as to Divorce is very interesting, and very often misunderstood. The primary object of the old law was to preserve the perfect liberty of the subject with respect to contracting Marriage—not to encourage Divorce. Traces of the old law appear in the *Dig.* lib. xlv. t. i. 134: "Inhonestum visum est vinculo pœnæ matrimonia obstringi sive futura sive jam contracta." *Code*, lib. v. t. iv. 14: "Neque ab initio matrimonium contrahere, neque dissociatum reconciliare quisquam cogi potest; unde intelligis liberam facultatem contrahendi atque distrahendi matrimonii transferri ad necessitatem non oportere." Lib. viii. t. xxxix. 2: "Libera matrimonia esse antiquitus placuit, ideoque pacta *ne liceret divertere*, non valere; et stipulationes quibus pœnæ irrogentur ei qui quæve divortium fecisset, ratas non haberi constat." It seems clear that the liberty of divorce was rarely resorted to before the year 553 A.U.C. The scandalous frequency of divorce after this period is well known to all readers of Plutarch, Tacitus, Cicero, Juvenal, Plautus, and Seneca. Augustus appears to have imposed some limitations upon it. Nor even after Christianity became the religion of the State, was divorce abolished. Constantine did not absolutely prohibit divorce, but limited the causes of it. The Council of Arles, A.D. 314, spoke doubtfully. St. Ambrose thought the language of the Gospel obscure, and that error on the point might be venial. Theodosius repealed the limitations of Constantine. Justinian restored, reluctantly, it is said, much of the license of divorce which had disgraced pagan Rome.—*Novell.* 117, c. viii. *De justis divortiorum causis marito permissis*; *Novell.* 134, c. x.; *Novell.* 140.

The differences between the Roman and Greek Churches on the subject of divorce are well known. The alteration in 1857 of the Law of England upon divorce was effected *Ecclesiâ inconsultâ* as much as the Law of France in 1792.

Cf. *Savigny, R. R.* viii. s. 399, ii. 1.

Troplong, De l'influence du Christianisme sur le droit civil des Romains, Chapitre VI. Du Divorce.

CHAPTER XXII.

FOREIGN DIVORCE—ENGLISH LAW.

DIX. The English Law upon divorces obtained by the sentence of a Foreign Tribunal has been reserved, on account of its moment and peculiarity, for consideration in this chapter.

The fundamental public policy of England, with respect to the question of Divorce, has, since the year 1857, undergone an entire change; the bearing of which ought, it should seem, upon all sound principles of Comity, materially to affect the decisions of her tribunals upon the validity of Foreign Divorces.

The question, of course, still remains whether England will allow an English Marriage between English persons, or between an English person and a foreigner, to be dissolved upon *other grounds* than those which in her recent legislation she has declared to be proper causes of divorce; but the argument that *any* divorce is contrary to the public policy—an argument hitherto of no mean weight—is in all reason, justice, and common sense entirely taken away.

DX. There are three divisions under which the English Law with respect to the validity of a Foreign Sentence of Divorce may be considered.

a. Foreign sentences of divorce *a mensâ et toro.*

β. Foreign sentences of divorce *a vinculo matrimonii* before the English statute legalizing divorce.

γ. Foreign sentences of divorce since the passing of that Statute.

DXI. (*a*) Upon the question of the effect due in England to a foreign sentence of divorce *a mensâ et toro*, it is safe to use the language of Lord Stowell:—

"Something" (he observed) "has been said on the "doctrine of law regarding the respect due to foreign "judgments; and, undoubtedly, a sentence of separation, "in a proper Court, for adultery, would be entitled to credit "and attention in this Court; but I think the conclusion "is carried too far when it is said that a sentence of nullity "of marriage is necessarily and universally binding on "other countries. *Adultery and its proofs are nearly the "same in all countries. The validity of marriage, however, "must depend, in a great degree, on the local regulations of "the country where it is celebrated.* A sentence of nullity "of marriage, therefore, in the country where it was "solemnized, would carry with it great authority in this "country; but I am not prepared to say that a judgment "of a third country, on the validity of a marriage, not "within its territories, nor had between subjects of that "country, would be universally binding. For instance, "the marriage, alleged by the husband, is a French mar-"riage; a French judgment on that marriage would have "been of considerable weight; but it does not follow that "the judgment of a Court at Brussels, on a marriage in "France, would have the same authority, much less on a "marriage celebrated here in England. Had there been "a sentence against the wife for adultery in Brabant, it "might have prevented her from proceeding with any "effect against her husband here; but no such sentence "anywhere appears" (*a*).

DXII. In an earlier case, the sentence of the Parliament of Paris, declaring a marriage null, had been pleaded,

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(*a*) *Sinclair* v. *Sinclair*, 1 *Haggard's Consist. Rep.* p. 297.

Lord Hardwicke is reported to have said that the sentence of a competent Court in France on the *validity* of a marriage was, by the Law of Nations, conclusive.—*Roach* v. *Garvan*, 1 *Vesey Senior's Rep.* p. 157.

not as a *bar*, but as evidence of the French Law on a marriage contracted in France. The suit in England was for a Restitution of conjugal rights (*b*) : it was dismissed.

DXIII. The effect of a foreign sentence was also much discussed before the Arches Court of Canterbury and the Judicial Committee of the Privy Council in the very important case of *Connelly* v. *Connelly* (*c*).

In this case, the wife pleaded in bar to a suit for a restitution of conjugal rights by the husband, that she and her husband had both, subsequently to their marriage, entered into religious orders, and agreed to live apart; and that the Court of Rome had decreed their separation.

It was contended on the other side—

1. That being Americans by origin, and not domiciled at Rome, the Court there had no jurisdiction;

2. That the pretended sentence was no sentence of a Court;

3. That the sentence of a third country was not binding here;

4. That the husband had a right to enforce the original obligations of the nuptial contract.

No objection, it should be observed, had been taken to the jurisdiction of the English Court. The Court of Arches rejected the plea in bar. The Appellate Court of the Privy Council allowed the wife to amend her plea, by stating that she and her husband were domiciled at Rome at the time when the alleged sentence was passed; and that by the Law of their American domicil (the *lex loci contractûs*), that sentence would be holden valid; but gave no opinion as to what the effect of such further pleading might be.

DXIV. (*β*) With respect to a foreign sentence of divorce *a vinculo* before the passing of the Statute.

The Courts in England have refused to acknowledge

(*b*) *Scrimshire* v. *Scrimshire*, 2 *Haggard's Consist. Rep.* p. 395 (A.D. 1752).

(*c*) 7 *Moore's P. C. Rep.* p. 438.

the validity of any sentence of divorce *a vinculo matrimonii*, pronounced upon an English marriage celebrated in England between English-born subjects (*d*). They have, however, indirectly recognized the validity of a Scotch sentence of divorce *a vinculo matrimonii*, in a case where the marriage had been celebrated in England, and the parties to it were a Scotchman by birth, property, and connections, though frequently resident in England, and an Englishwoman. They had been separated for some time, and at the time of the divorce the husband was living almost wholly in Scotland, and the wife in France (*e*).

Perhaps, speaking quite strictly, there cannot be said to have been any direct English decision upon a case in which the parties were married in England, and having afterwards acquired a *bonâ fide* domicil *animo et facto* in another country, were there, after the acquisition of such domicil, divorced *a vinculo matrimonii* according to the *lex loci* by a competent tribunal (*f*).

In the celebrated case of *Lolley*, the husband went from England to Scotland, and, without having acquired a domicil (*g*), procured a divorce *a vinculo* there, and then married another wife. Lolley was found guilty of bigamy by the twelve judges, and a part of the criminal punishment was actually inflicted upon him.

(*d*) *Lolley's Case*, 1 *Russ. & Ry. Crown Cases*, p. 237.

(*e*) *Warrender* v. *Warrender*, 9 *Bligh's N. Rep.* p. 69; 2 *Clark & Finn. Rep.* p. 488; *vide post*, § dxviii.

(*f*) See Dr. Lushington's remarks in *Conway* v. *Beazley*, 3 *Haggard's Eccl. Rep.* p. 639.

This case, as well as that subsequently alluded to of *Macarthy* v. *Decaix*, was decided in the early part of 1831.

But Dr. Lushington and Lord Brougham appear in these cases to have taken rather different views of the *extent* of the decision in *Lolley's Case*.

[See now *Harvey* v. *Farnie*, *L. R.* 8 *App. Ca.* p. 43, though decided of course long after the passing of the English Divorce Act of 1857.]

(*g*) See Lord Cranworth's remarks in *Dolphin* v. *Robins*, 7 *H. L. C.* p. 390 [and see *Briggs* v. *Briggs*, *L. R.* 5 *P. D.* p. 163].

DXV. In subsequent cases, both Lord Chancellor Eldon (*h*) and Lord Chancellor Brougham (*i*) appear to have considered the judgment in *Lolley's* case as going the whole length of deciding that a Foreign divorce could not operate to dissolve an English marriage; and the additional condition of the divorce being between *English parties* does not appear to have been engrafted upon that decision till the case of *Warrender* v. *Warrender* (*ii*).

DXVI. It has been observed that for more than a century the Scotch Courts have holden that, without reference to the country where the marriage was celebrated, [they can entertain jurisdiction if the parties have resided for a certain period in Scotland, although such residence] fall far short of a legal domicil (*k*). In Scotland it has, since the Reformation at least, been competent to the Scotch Court to divorce *a vinculo*; and since the decision (*l*) of the House of Lords and of the twelve English judges, the fifteen judges of Scotland have, nevertheless, expressly re-affirmed this to be the Law of Scotland.

DXVII. The observations of Lords Brougham and Lyndhurst in *Warrender* v. *Warrender* (*m*), it can hardly be denied, shook, to a certain extent, the doctrine of *Lolley's* case, though the authority of that case was, as will be presently seen, recognized in the case of *Dolphin* v. *Robins*.

DXVIII. But, at all events, the case of *Warrender* v. *Warrender*, decided in 1835, contains the opinion of Lord Brougham, that a sentence of Divorce *a vinculo matrimonii*, pronounced by the country where the parties were domi-

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(*h*) *Tovey* v. *Lindsay*, 1 *Dow's Rep.* pp. 124, 125.

(*i*) *Macarthy* v. *Decaix*, 2 *Russ. & Myl. Rep.* pp. 619, 620.

See, however, Lord Brougham's explanation, in *Warrender* v. *Warrender*, of his remarks in this case of *Macarthy* v. *Decaix*.

[(*ii*) See *Harvey* v. *Farnie*, *L. R.* 8 *App. Ca.* p. 54.]

(*k*) *Conway* v. *Beazley*, 3 *Haggard's Eccl. Rep.* p. 646.

(*l*) The case of *Edmiston* referred to by Lord Lyndhurst in *Warrender* v. *Warrender*, 9 *Bligh's N. Rep.*, pp. 150-151.

(*m*) The Lords, in *Warrender* v. *Warrender*, considered themselves as a *Scotch* Court of Appeal from a *Scotch* Court.

ciled, ought, even in the case of an English marriage, upon principles of Comity, to be recognized in this country. The reasoning of the learned judge applies more forcibly to the case of a *Scotch divorce* of a *Scotch marriage* between *English subjects*. The English Courts having recognized the authority of Scotland to complete the obligation of the marriage tie, ought, it is argued, to acknowledge its competency to dissolve it on the principle of the maxim, "Unumquodque dissolvitur eodem modo quo colligatur:" and it is said with great force, as to the opportunity which a strict adherence to the Law of Scotland with respect to the dissolution of the contract would give to the violators of the English Marriage Law—"This objection comes too "late" (*mm*), after the decisions which have established that the Scotch marriage of English parties avowedly *in fraudem legis*, is valid; that there is no sense in complaining of the evasion of English Law, which would arise from supporting Scotch divorces, and sanctioning the evasion of English Law by upholding Scotch marriages, which, as in the case of minors, entirely subvert it.

"If" (says Lord Brougham) "in a matter confessedly "not clear, and very far from being unincumbered with "doubt and difficulty, we find that manifest and serious in- "convenience is sure to result from one view, and very little "in comparison from adopting the opposite course, nothing "can be a stronger reason for taking the latter. Now "surely it strikes every one that the greatest hardship must "occur to parties, the greatest embarrassments to their "rights, and the utmost inconvenience to the courts of "justice in both countries, by the rule being maintained "as laid down in *Lolley's* case. The greatest hardship to "parties; for what can be a greater grievance than that "parties living *bonâ fide* in England, though temporarily, "should either not be allowed to marry at all during their "residence here, or if they do, and afterwards return to

[(*mm*) 9 *Bligh's N. Rep.* at p. 131.]

"their own country, however great its distance, that they "must be deprived of all remedy in case of misconduct, "however aggravated, unless they undertake a voyage back "to England, ay, and unless they can comply with the "parliamentary forms in serving notices? The greatest "embarrassments to their rights; for what can be more "embarrassing than that a person's *Status* should be in- "volved in uncertainty, and should be subject to change "its nature, as he goes from place to place; that he should "be married in one country, and single, if not a felon, in "another—bastard here, and legitimate there? The utmost "inconvenience to the Courts; for what inconvenience can "be greater than that they should have to regard a person "as married for one purpose, and not for another; single "and a felon, if he marries a few yards to the southward— "lawfully married if the ceremony be performed a few "yards to the north; a bastard when he claims land, "legitimate when he sues for personal successions; widow, "when she demands the chattels of her husband, his 'concubine when she counts as dowable of his land" (*n*)?

. . . . . .

"I have now been commenting upon *Lolley's* case on "its own principle—that is, regarding it as merely laying "down a rule for England, and prescribing how a Scotch "divorce shall be considered in this country, and dealt "with by its Courts. I have felt this the more necessary "because I do not see, for the reasons which have occasion- "ally been adverted to in treating the other argument, how, "consistently with any principle, the judges who decided "the case could limit its application to England, and think "that it did not decide also on the validity of the divorce "in Scotland. They certainly could not hold the second "English marriage invalid and felonious in England with- "out assuming that the Scotch divorce was void even in "Scotland. In my view of the present question, therefore, "it was fit to show that the Scotch Courts have a good

(*n*) 9 *Bligh's N. Rep.* pp. 130–131.

"title to consider the principle of *Lolley's* case erroneous "even as an English decision. This, it is true, their Lord- "ships have not done; and the judgment now under appeal "is rested upon the ground of the Scotch divorce being "sufficient to determine the marriage-contract in Scotland "only.

"I must now observe, that, supposing (as may fairly "be concluded) *Lolley's* case to have decided that the "divorce is void in Scotland, there can be no ground what- "ever for holding that it is binding upon the Scotch Courts "on a question of Scotch Law. If the cases and the "authorities of that Law are against it, the learned persons "who administer the system of jurisprudence are not bound "to regard—nay, they are not entitled to regard—an Eng- "lish decision, framed by English judges upon an English "case, and devoid of all authority beyond the Tweed" (*nn*).

DXIX. The cases which intervened between that of *Lolley* and that of *Warrender* v. *Warrender* were, first, *Macarthy* v. *Decaix* (*o*), in the Court of Chancery, the case of a Danish divorce. The husband, a Dane by birth and domicil, married in England an English wife. They afterwards both became domiciled in Denmark. Lord Eldon hesitated, and said he could not take it as settled by *Lolley's* case that the marriage was not, for English purposes, dissolved by the Danish divorce; but Lord Brougham, becoming Lord Chancellor, decided against the validity of the divorce, on the authority of *Lolley's* case. Lord Brougham's subsequent remarks in *Warrender* v. *Warrender* are not consistent with this judgment; and the authority of it appears now, at all events since the passing of the recent Statute, to be doubtful (*oo*). Secondly, in the same year as *Macarthy* v. *Decaix*, the case of *Conway* v. *Beazley* (*p*)

(*nn*) 9 *Bligh's N. Rep.* pp. 132-133.

(*o*) 2 *Russell & Myl. Rep.* p. 614.

[(*oo*) "I am compelled to speak without much respect of *Macarthy* v. *Decaix*" per Lord Selborne, *Harvey* v. *Farnie*, *L. R.* 8 *App. Ca.* at p. 52.]

(*p*) 3 *Haggard's Eccl. Rep.* p. 642.

was decided by Dr. Lushington in the Consistory of London, in which that learned judge held that a Scotch divorce did not annul an English marriage; but he observed:—"My judgment, however, must not be con-"strued to go one step beyond the present case; nor in "any manner to touch the case of a divorce *a vinculo* pro-"nounced in Scotland between parties who, though mar-"ried when domiciled in England, were, at the time of "such divorce, *bonâ fide* domiciled in Scotland; still less "between parties who were only on a casual visit to Eng-"land at the time of their marriage, but were then and at "the time of the divorce *bonâ fide* domiciled in Scotland."

This question Dr. Lushington did not consider to have been decided by the case of *Lolley* (*q*).

DXX. (γ) With respect to foreign sentences of divorce since the passing of the modern Statute.

On January 1, 1858, the Law of England underwent a change of the greatest moment. It is not too much to say that no law has been passed since the Reformation so vitally affecting the social and moral condition of this realm. By this law marriages were, for the first time, rendered dissoluble. Before this law, marriages had been dissolved by special acts of Parliament, the passing of which bore testimony to the general law of indissolubility: this *privilegium* was certainly open to the gravest objections, and was on principle indefensible; but its practical effect upon the social and moral state of the people was inconsiderable. The practical effect of the present law is, alas! certainly not inconsiderable. With respect to its international operation it surely ought, upon sound principles of Comity, to lead to a recognition of Foreign divorces of English subjects *domiciled abroad* for the same causes at least which the *lex patriæ* allows to be grounds of divorce—namely, adultery, on the part of the wife;

(*q*) In the case of *Tovey* v. *Lindsay*, 1 *Dow's Rep.* p. 117, in 1813—an appeal from Scotland to the House of Lords on a question of jurisdiction—no decision was given.

cruelty and adultery, or desertion and adultery, on the part of the husband.

Since the passing of the Statute, the following case has been decided; but the Scotch divorce, it will be observed, had in this case been decreed before the passing of the Statute.

A domiciled English husband married in England a wife, in the year 1822; they separated by mutual consent in 1839.

In 1854, the husband went to Scotland—his wife followed him. After a few weeks' residence, sufficient, according to the Scotch Law, to found the jurisdiction of the Scotch Court, the wife sued the husband for adultery, and obtained the decree of a Scotch Court, dissolving the marriage. The husband had not at the time a domicil, but only a temporary residence, in Scotland.

The wife afterwards resided in Paris, and married a Frenchman in that country. The House of Lords held, affirming the decision of the Court of Probate, that the Scotch divorce had not dissolved the English marriage (*r*).

The circumstances of the case were such as to show, that the divorce was effected by gross collusion. Lord Kingsdown said, "It is clear, therefore, it was mere mockery and "collusion from beginning to end." Lord Cranworth, who spoke first and gave the judgment of the Lords in detail (*s*), said, "My Lords, the very learned judge of the "Court of Probate rejected the allegation of the Appellant, "on the ground that it stated no case impeaching the validity "of the will and codicil propounded by the Respondents.

(*r*) *Dolphin* v. *Robins*, 1 *Swabey & Tristram Rep.* p. 37; 7 *H. L. C.* p. 390; 3 *Macqueen, H. L. C.* p. 563 (A.D. 1859).

(*s*) In this judgment it was decided that the Scotch sentence of divorce *a vinculo* could not operate as a divorce *a mensâ et toro* in England. Also it should be observed that Lord Cranworth's opinion inclined to admit that a wife divorced *a mensâ et toro* may have a separate domicil from her husband. Lord Kingsdown expressed an opposite opinion: this question was not, however, decided.

"The grounds on which the Appellant relied were, that "by the proceedings in Scotland the marriage with the "Appellant was dissolved so as to enable the deceased to "contract a new marriage; that she did in fact contract "a new marriage, in 1854, with General des Pontes, a "domiciled Frenchman, and became herself domiciled in "France, and so continued from the time of her marriage "till her death, and that while so domiciled she made the "will of 23rd of June, 1856, in the mode required by the "Laws of the country of her domicil, which therefore was "a valid revocation of the will and codicil of April 1854. "The Appellant further contended that, even if the divorce "was not valid so as to enable the deceased to contract a "second marriage, still it operated as a divorce *a mensâ et* "*toro*, and enabled her to select a domicil of her own, and "that in fact she did select France as her domicil, where "she lived and died. The learned judge of the court below "was of opinion that the English marriage was not dissolved "by the Scotch divorce, and that so the deceased remained "up to the time of her death the wife of the Appellant "whose domicil was and had always been in England; that "his domicil was her domicil, and that the will or alleged "will of June 1856, not having been executed in the mode "required by our Laws, had no effect on the will and codicil "of 1854. He further held that the Scotch decree did not "operate as a divorce *a mensâ et toro*, and so made a decree "rejecting the allegation. The same arguments were re-"newed and urged with great ability at your Lordships' bar. "But they failed to convince me, or, as I believe, any of "your Lordships who heard the case. On the first question, "the validity of the Scotch divorce to dissolve the English "marriage, the decision in *Lolley's* case is conclusive. It "was, indeed, contended in the argument here that *Lolley's* "case did not necessarily govern that now under considera-"tion, for that since that decision the principles applicable "to this question have been materially changed by the "Statute 9 Geo. IV. c. 31. But this seems to me altogether

" a mistake. In *Lolley's* case it appeared that he, having " been married in England, afterwards went to Scotland, " and while he was there, *not having become a domiciled* " *Scotchman* (for that must be assumed to have been the " state of the facts), his wife obtained a Scotch decree for a " divorce on the ground of adultery committed by him in " Scotland. After the decree was pronounced he returned " to England and married a second wife at Liverpool. This " was held by the unanimous opinion of the judges to be " bigamy, on the ground 'that no sentence or act of any " 'Foreign country or State could dissolve an English mar- " 'riage *a vinculo matrimonii*,' meaning, I presume, could " dissolve the matrimonial *vinculum*, and that no divorce of " an Ecclesiastical Court was within the exception in 1 Jac. " I. c. 11, s. 3, unless it was the divorce of a Court within " the limits to which the 1 Jac. I. extends. The exception " to the Statute 1 Jac. I. was 'of any person divorced by " 'sentence in the Ecclesiastical Court.' It was contended " here that the decision might have been different if the case " had arisen since the 9 Geo. IV. c. 31, which repeals the " Statute 1 Jac. I. c. 11, and by sect. 22 again makes bigamy " a felony, but with a proviso that the enactment shall not " extend to any person who at the time of the second mar- " riage shall have been divorced from the bond of the first " marriage. It was said that the Scotch Court was not " the Ecclesiastical Court contemplated by the Statute 1 " Jac. I., and that so Lolley was not within the exception " contained in that Statute, but that, as he had been in " fact divorced, he would now have been within the pro- " viso of the Statute 9 Geo. IV. c. 31. This, however, is " evidently a mistake. He was not, and could not be, " divorced; for, according to the express opinion of the " judges, no Court can dissolve the bonds of an English " marriage. *Lolley's* case has been frequently acted on. " In the case of *Conway* v. *Beazley*, Dr. Lushington, after " much consideration, acted on it, treating it as settled law " where there is no *bonâ fide* domicil in Scotland, meaning

"by *bonâ fide* domicil a real domicil, and not a domicil assumed merely for the purpose of giving jurisdiction. And "I believe your Lordships are all of opinion that it must be "taken now as clearly established that the Scotch Court has "no power to dissolve an English marriage where, as in "this case, the parties are not really domiciled in Scotland, "but have only gone there for such a time as, according to "the doctrine of the Scotch Courts, gives them jurisdiction "in the matter. Whether they could dissolve the marriage "if there be a *bonâ fide* domicil is a matter upon which I "think your Lordships will not be inclined now to pronounce a decided opinion."

No mention is made in this judgment of any alteration effected by the recent Statute in the Law of England with respect to the general recognition of Foreign Sentences of Divorce on English subjects.

DXXI. In an Irish case it was holden that a marriage celebrated in England between a native and domiciled Scotchman and an Irishwoman may be dissolved by a decree for a divorce pronounced by the Court of Session in Scotland (*t*).

In the case of *Shaw* v. *Gould* (*u*) the following positions of Law were laid down:—

A Foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree of divorce *a vinculo*, in the case of an English marriage between English subjects, unless such subjects are at the time of such decree pronounced *bonâ fide* domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion.

Where, therefore, there was an English marriage between two English persons, who however never lived together, but the husband committed adultery, and some

(*t*) *Maghee* v. *M'Allister*, 3 *Irish Chanc. Rep.* p. 604.

(*u*) *L. R.* 3 *H. L.* p. 55. Reported in the Court of Chancery, *Re Wilson*, *L. R.* 1 *Eq.* p. 247 (A.D. 1868).

years afterwards consented to go to Scotland to found jurisdiction against himself, and did so, and the Scotch Court pronounced a decree of divorce *a vinculo*:

It was holden that a Scotch marriage duly celebrated between the divorced wife and an Englishman (who was thenceforth domiciled in Scotland) did not give to the children of their union the character of "lawfully begotten," so as to enable them to succeed to property in England, for that the Scotch divorce had not dissolved the English marriage.

In *Shaw* v. *The Attorney-General* (*x*), a case under the Legitimacy Declaration Act 1858 (21 & 22 Vict. c. 93), the facts were, that the petitioner, whose original domicil was English, and who married in England, resided for two and a half years in one of the States of America, and then petitioned the competent Court in that State for a dissolution of her marriage on grounds for which, if proved, the English Court of Divorce would also dissolve an English marriage. No personal notice of the proceedings was given to the husband, who had never been within the State, and whose domicil continued to be English. The marriage having been dissolved, the petitioner re-married in America in the lifetime of her first husband.

It was holden that a divorce so obtained could have no legal effect upon an English marriage, and that therefore the second marriage was invalid.

It was, however, intimated as his opinion by the Judge Ordinary, that if the petitioner had been legally domiciled in the State at the time the divorce was granted, the English Courts would have recognized and acted on the decree.

But the question whether England will recognize a Foreign sentence of divorce upon English subjects domiciled in the State of the *forum* which pronounced it, is yet, unhappily, undecided.

(*x*) *L. R.* 2 *Prob. and Matr.* p. 156 (A.D. 1870).

It has been already stated that the argument of such divorces being *contra bonos mores* (*z*), or of their falling under the class of the exceptional restrictions (*a*) which prevent the admission of Foreign Laws and Sentences, cannot now be righteously advanced by England.

And where no such obstacle presents itself, the principles of Comity would lead to the recognition of the Foreign Sentence.

[DXXI.A. In *Collis* v. *Hector* (*b*) Vice-Chancellor Hall refused to recognize a decree of a Turkish Court dissolving a marriage which had taken place in London between an Englishwoman and a Turk. The parties had resided and were domiciled in Turkey, but the proceedings were taken during the absence of the wife on a visit to England, and without her knowledge. It appears also to have been doubtful whether the Turkish Court was one of competent jurisdiction.

The question in *Harvey* v. *Farnie* (*c*) was whether the English Courts should recognize a sentence of divorce *a vinculo* pronounced, at the instance of a wife, by a Scotch Court in a case where the husband was originally, and had always remained, a domiciled Scotchman; but where the marriage had been celebrated in England, the wife was by birth an Englishwoman, and the grounds for the sentence were not such as in England would support a decree of divorce. The House of Lords, affirming the judgments of Sir James Hannen in the Probate Division, and of Lords Justices James, Cotton, and Lush, in the Court of Appeal, decided the question in the affirmative. Since for the purposes of the case a Scotch-

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(*z*) That is, at least, of foreign divorces granted upon *the same grounds* as those specified in the Act of 1857. The argument might yet, though much weakened, be used against the recognition of foreign divorces decreed on *other* grounds.

(*a*) *Vide suprà*, § xii., et seq.

[(*b*) *L. R.* 19 *Eq.* p. 334.

(*c*) *L. R.* 8 *App. Ca.* p. 43. (A.D. 1882.)]

man was in the same position as a foreigner, the decision becomes an authority for the proposition that where an Englishwoman has married a foreigner in England, a decree relating to the marriage, obtained, without collusion or fraud, from the proper matrimonial tribunal of the foreign country in which the husband has his domicil, must be recognized as valid by the Courts in England. The domicil must be a *bonâ fide* one (*d*), and the country, it seems, a Christian country (*e*).

This decision was acted upon in the late case of *Turner* v. *Thompson* (*f*), where a form of marriage having been gone through in England between an Englishwoman and an American, the parties went to reside in the United States, and there a decree dissolving the marriage on the ground of incapacity was pronounced by the Supreme Court of Columbia—the form of the decree being a dissolution, and not, as in this country, a declaration of nullity. It was held that the marriage was totally and absolutely dissolved by the American decree.]

[(*d*) Per James, L.J., *L. R.* 6 *P. D.* at p. 47.
(*e*) Per Cotton, L.J., *L. R.* 6 *P. D.* at p. 48.
(*f*) *L. R.* 13 *P. D.* p. 37.]

CHAPTER XXIII.

PATERNAL RIGHTS.

DXXII. THE next question arising from the relations of Family is that of the *Patria Potestas*, or *Paternal Rights* (*a*). The continental nations of Europe recognize an extent of Paternal Power, derived from the Roman Law, which is unknown to the Common Law of Great Britain and of the United States of North America; and this fact is used by Mr. Justice Story as an argument for adhering to the rule, that in the case of marriages the *lex loci contractûs* shall prevail.

DXXIII. The Paternal Power is to be considered with respect to

1. The Person
2. The Property

} of the Child.

With respect to the Person, the Private International Law of Germany, throughout its various States, upon this subject appears to declare, as a general rule, that the same rights are accorded to the parents and children of strangers, which they can, by legitimate proof, satisfy the proper German authorities that they possessed in their native country, or in the country of their domicil at the

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(*a*) *Story*, ss. 25, 90, 455, 456, 462, 463*a*. *Wharton*, ss. 252-258; *Bar*, §§ 102-104.

Pütter, Das praktische Europäische Fremdenrecht, Theil II. Kap. 2, §§ 48-61. Von den Eltern- und Kindesrechten der Fremden.

Savigny, R. R. viii. ss. 380, 396.

Merlin, Rép.: Puissance Paternelle.

time when the Paternal or Filial relation was called into existence (*b*).

DXXIV. It is quite clear, however, that no country would tolerate such an exercise of parental authority, however warranted by the Law of the Origin or Domicil, as actually *violated* the Law of the land. Upon this point Wächter (*c*), though his illustration from the supposed Law of England is ridiculous (*d*), speaks with firmness and accuracy.

DXXV. The limitations under which the *patria potestas* of a foreign father over the *person* of his child is admitted in England may be well gathered from the following remarks of Lord Chancellor Cottenham :—

"It was urged that the Court must recognize the "authority of a foreign tutor and curator, because it "recognizes the authority of the parent of a foreign child. "This illustration proves directly the reverse; for al- "though it is true that the parental authority over such "a child is recognized, the authority so recognized is only "that which exists by the Law of *England*. If, by the "Law of the country to which the parties belonged, the

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(*b*) "Als Vaterland des Fremden wird aber jener Ort erklärt, dessen Gesetzen derselbe vermöge seiner Geburt als Unterthan unterliegt."—*Puttlingen, Die gesetzliche Behandlung der Ausländer in Oesterreich*, ss. 47, 48.

[See Prussian Code, *Einleitung*, §§ 23, 25, 34, and Theil II. tit. ii. Von den wechselseitigen Rechten und Pflichten der Aeltern und Kinder.]

"Die Entstehung der väterlichen Gewalt durch Zeugung in der Ehe, sowie deren denkbare Anfechtung, ist zu beurtheilen nach dem Gesetz des Ortes, an welchem der Vater zur Zeit der Geburt des Kindes seinen Wohnsitz hatte."—*Savigny, R. R.* viii. s. 380.

"È palese che lo statuto che definisce la patria potestà è personale, al pari dello statuto che fissa la minore età, e la interdizione."—*Rocco*, lib. iii. cap. xix. pp. 416, 417.

(*c*) *Wächter, Die Collision* &c., § 23, *in fine*. (*Archiv*, vol. xxv. p. 188.)

(*d*) *E.g.* that a man cannot in Germany, as he may in England (!), sell his wife in the market-place.

" authority of the father was much more extensive and " arbitrary than in this country, is it supposed that a " father would be permitted here to transgress the power " which the Law of this country allows? If not, then " the Law of this country regulates the authority of the " parent of *a foreign child living in England* by the Laws " of England and not by the Laws of the country to " which the child belongs " (*e*).

DXXVI. With respect to the operation of Parental relations upon the Property of the child, according to the ancient Roman Law, no child under the Paternal power was capable of acquiring property for himself—his acquisitions belonged to his father. This rule of law received many limitations in the course of time, as in the case of the *castrense peculium* and the *bona materna*. The general law, however, remained in force till the time of Justinian, who abrogated it entirely, and allowed the child to be the proprietor of his own future acquisitions (*f*). Savigny expresses an unhesitating opinion that the parental relations are governed by the Law of the Domicil of the Parents—not by the law of the place in which the child was born. A change of domicil, therefore, might be followed by a change of law in this matter (*g*). The reason for this opinion is, that the laws which regulate the acquisitions of children, being more or less a restriction

(*e*) *Johnstone* v. *Beattie*, 10 *Clark & Finnelly's Rep.* p. 114.

(*f*) *Codex*, lib. vi. t. lxi. 1.
Instit. lib. ii. t. ix. 1, 2.

(*g*) " Dagegen sind die Vermögensverhältnisse zwischen dem Vater und den Kindern zu beurtheilen nach dem Gesetz, welches an dem *jedesmaligen Wohnsitz* des Vaters besteht, so dass also eine Veränderung des Wohnsitzes auch eine Veränderung dieser Verhältnisse nach sich ziehen kann."—*Savigny*, *R. R.* viii. s. 380.

" Im Europäischen Völkerrecht richtet sich die Verfügungs-Befugniss des Vaters über das Einkommen vom Vermögen seiner Kinder nach dem Recht des Landes wo die dazu gehörigen Sachen sich befinden, sein Genuss desselben,—Nutzniessung, &c. (i.e. *usus-fructus*) nach dem Rechte ihres Wohnorts."—*Pütter*, *ibid.* Theil II. Kap. 2, § 54.

upon the natural capacity of acquiring, belong to the individual *Status*, which is, according to Savigny's doctrine, always dependent on the Law of the domicil; and this affects all the children—those born before as well as those born after the domicil has been acquired (*h*). This rule was incorporated into the Prussian Laws (*i*).

DXXVII. Much discussion has taken place among continental jurists as to whether the Paternal Power extends to *immoveable* as well as to *moveable* property; or, as they phrase it, whether the law is *personal* or *real*.

Story (*k*) collects and examines these opinions. Bretonnier, Hertius, Bouhier, Le Brun, D'Argentré, maintain that the Paternal Power is *altogether personal*, and extends to immoveable property in a foreign country. On the other hand, Froland, Boullenois, and the high authority of D'Aguesseau (*l*) are against the extension of the Paternal Power to immoveable property. Merlin strives to steer a middle course between both opinions.

DXXVIII. Savigny (*m*), following Schäffner, altogether disapproves of the maxim of the English and American Law, that the *lex rei sitæ* and not the *lex domicilii* governs all questions, and, therefore, this one among the number, relating to immoveable property (*n*).

The result appears, therefore, to be, that the rights of the Father with respect to the property of the minor child are, according to the common law of Europe, the Roman Law, governed by the Law of the domicil; and this appears to be the Law of France.

Where the English Law prevails, these rights, so far as they affect *immobilia*, are governed by the *lex loci rei*

(*h*) *Savigny, ubi sup.* s. 396, num. 2.

(*i*) *Ibid.*

(*k*) *Conflict of Laws*, ss. 455–463a.

(*l*) *Story* cites all these authorities; but see also authorities cited by *Rocco*, lib. i. cap. ii., lib. iii. cap. xix.

(*m*) *R. R.* viii. s. 380.

(*n*) See *Birthwhistle* v. *Vardill*, 7 *Clark & Finnelly's Rep.* at p. 911.

situs. It is to be observed that, according to the Roman, but not the English Law, the father has a right to some enjoyment of the fruits of the minor's property as well as to the administration of it.

DXXIX. It would seem to be an inference from the only decision which has been given in an English court of justice, that the Parental Power, with respect to the *personal* or *moveable property* of minors, was considered by English Law as depending upon and changing with the domicil. The case of *Gambier* v. *Gambier* (*o*) was as follows:—

[In 1818, the Earl of Athlone (who was also Count de Reede in Holland) married, at Paris, Miss Hope, who was possessed of large personal property. The Earl was domiciled in Holland; Miss Hope was born at Amsterdam, of English parents, and, at the time of this marriage, declared her domicil to be at the Hague.

The Earl died, leaving issue of the marriage three children; and in 1825 his widow, the Countess, married Mr. Gambier, a British subject, and came to live in England. On the occasions of both marriages, ante-nuptial contracts were drawn up and executed in Holland, but the operation of these contracts became subject to the judicial compromise mentioned hereafter.

There were two children by the marriage with Mr. Gambier, both born in England.

In 1829 proceedings were instituted in the Dutch courts by the guardian of the children of the first marriage, for the purpose of ascertaining the legal rights of those children with regard to their parents' property. Pending the proceedings the Countess died, and shortly afterwards a judicial compromise was made of the matter in dispute, and embodied in a formal instrument, drawn up at the Hague, under which one moiety of all that the Countess had left was allotted to the children of her first marriage,

(*o*) 7 *Simons' Rep.* p. 263.

and the other moiety to Mr. Gambier and the children of his marriage, so that he should have one-fourth and his children one-fourth.

By the *Code Napoléon*, which at that time was the law of Holland, the father during the coverture, and afterwards the surviving parent, was entitled to the income of the children's property until they attained the age of eighteen, or became previously emancipated (Art. 384). Mr. Gambier contended that as his children were under the prescribed age, and the marriage contract and judicial compromise, under which they took one-fourth, were both made in Holland, the children must take it subject to his paternal rights by the Law of Holland.] Vice-Chancellor Shadwell held that the father was not so entitled. He said, "The "rights of the plaintiffs are not derived under the settle- "ment made upon their mother's marriage with Mr. Gam- "bier, but under the judicial compromise, which I must "consider as a judicial decree which adjudicated that the "children were entitled to one-fourth of their mother's "personal estate. They take by virtue of that judicial "decision; the contract is entirely out of the question."

"By the *Code Napoléon*, which is the Law of Holland, "as well as of France, when children are under the age "of eighteen, their surviving parent has the enjoyment of "their property until they attain that age. But that is "nothing more than a *mere local right*, given to the sur- "viving parent, by the law of a particular country, so long "as the children remain subject to that law; and, as soon "as the children are in a country where that law is not in "force, their rights must be determined by the law of the "country where they happen to be. These children were "never subject to the Law of Holland; they were both "born in this country, and have resided here ever since. "The consequence is, that this judicial decree has adjudged "certain property to belong to two British-born subjects "domiciled in this country; and so long as they are "domiciled in this country, thei personal property must

"be administered according to the law of this country. "The claim of their father does not arise by virtue of the "contract, but solely by the local law of the country "where he was residing at the time of his marriage; and, "therefore, this property must be considered just as if it "had been an English legacy given to the children; and "all that the father is entitled to is the usual reference "to the Master, to inquire what allowance ought to be "made to him for the past and future maintenance of his "children."

DXXX. The Judicial Committee of the Privy Council decided, in the case of *Sherwood* v. *Ray* (*p*), that the Ecclesiastical Courts in England adopted that part of the Canon Law, "which abrogated the *patria potestas* of the Civil "Law, and placed the parental authority in this respect "in the hands of their spiritual guides; and that that "part of the Canon Law which takes away the control of "parents over the marriage of their children is undoubtedly "in force in this country, the marriage of males of four-"teen years and of females of twelve being unquestionably "valid by the Law of England, *before* the Marriage Acts, "with or without the consent of the parents" (*q*).

DXXXI. (*r*) *Adoption*, *Arrogation*, and *Emancipation* are legal relations founded on the Roman, and unknown to the English Law; but, whatever consequences, affecting the *Status*, flow from them, according to the personal Statute or Law of the domicil, ought to be recognized in other countries: subject always to the exceptions to this general rule, which have been already mentioned.

(*p*) 1 *Moore's P. C. Rep.* p. 398.

(*q*) See in chapter XXV. the leading case *Re Alicia Race*, as to guardianship by nurture of the widow.

(*r*) *Fœlix*, liv. i. t. i. s. 33, observes of the *Statut Personnel*, "Cette loi régit le mode de constater l'état civil: elle régit également les effets de la puissance paternelle, en ce qui concerne la personne des enfants, la manière de constituer le tuteur; elle indique les personnes qui peuvent être appelées à cette fonction civile, et elle définit les pouvoirs du tuteur: elle détermine les cas où l'émancipation peut avoir lieu; elle définit l'âge de la majorité; . . . "

CHAPTER XXIV.

ILLEGITIMATE CHILDREN—POLICY OF STATES.

DXXXII. The question as to the *Status* of children born out of lawful wedlock, the parental power which can be exercised over them, the rights which they can claim at the hands of one or both of their parents, constitute some of the most difficult problems both of Private Right and of Public Law (*a*).

The question in all its bearings is one which certainly much concerns the well-being of the State; for it greatly affects the general morality of the people, upon which the security of all States is built.

The public policy of States has looked at this question from two distinct points of view—always of course with the same object, that of checking the frequency of the crime. In truth, the whole question borders upon the considerations of *Criminal* International Law. At the same time, it would be absurd to apply the *lex loci delicti commissi* (*b*) to settle the question of the obligations of the parents towards the child (*c*).

In some countries it has been sought to obtain this moral end by enlarging and strengthening the claims of

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(*a*) *Story, Conflict of Laws*, ss. 93–93 *w*; *Bar* § 102.

Burge, Commentaries on Foreign and Colonial Law, vol. i. pt. i. ch. iii. s. 3.

Savigny, R. R. viii. s. 399, num. ii. 3.

Rocco, lib. iii. cap. xix.

Pütter, Fremdenrecht, Theil II. Kap. ii. §§ 58–61.

(*b*) *Savigny, R. R.* viii. s. 374.

(*c*) This is clearly stated by *Seuffert*, and adopted by *Schäffner, Entwickelung des Internationalen Privatrechts*, § 98.

the child upon the father, as a punishment of the male offender; in others by narrowing, or, as in France (*d*), altogether taking away, the claims of the mother or the child upon the father, as a punishment of the female offender. In both cases, the Law has a *moral* end in view, and therefore it falls under the category of the exceptions to the operation of the general rule of Comity, that is to say, the *Status* of the illegitimate child will be determined by the Law of the land in which he is living, without reference to the Law of the domicil of either of the parents at the time of the birth of the child.

DXXXIII. Thus, if an attempt was made by the mother, who had been a concubine domiciled in a country where concubinage was a legal *Status*, to enforce before a French Tribunal either a claim of affiliation or any other claim growing out of the *Status* of concubinage, such a claim would be rightly rejected by the French Tribunal, inasmuch as its recognition would militate against a

(*d*) *Code Civil*, art. 340. "La recherche de la paternité est interdite.

["Dans le cas d'enlèvement, lorsque l'époque de cet enlèvement se rapportera à celle de la conception, le ravisseur pourra être, sur la demande des parties intéressées, déclaré père de l'enfant."

Art. 341. "La recherche de la maternité est admise."

Art. 342. "Un enfant ne sera jamais admis à la recherche soit de la paternité, soit de la maternité, dans les cas où, suivant l'article 335, la reconnaissance n'est pas admise."

Art. 335. La reconnaissance d'un enfant naturel "ne pourra avoir lieu au profit des enfants nés d'un commerce incestueux ou adultérin."

Cf. the Italian Civil Code, art. 189.—"Le indagini sulla paternità non sono ammesse. . . ."

Art. 190. "Le indagini sulla maternità sono ammesse."

And the Dutch Civil Code, art. 342.—"Het onderzoek naar het vaderschap is verboden."

Art. 343. "Het onderzoek, wie moeder van het kind is, wordt toegelaten."

Both the Italian and Dutch Codes contain exceptions similar to those quoted above from the French Code.]

Savigny defends the French law on the ground that the subject of it, properly speaking, is not the personal *status*, but a matter of public policy and positive law.—*Savigny*, *R. R.* viii. s. 399; s. 374, note *aa*.

moral principle of French Law (*e*). Savigny remarks, that this principle [had been adopted by certain Prussian Provinces] (*ee*).

DXXXIV. In these remarks the *factum* of the illegitimacy of the child has been assumed; but, if the *factum* itself be in dispute, a most difficult question of Private International Law arises, and one with respect to which the decisions of that Law are far from satisfactory. The shape which this question has generally assumed has been that of the "*legitimatio per subsequens matrimonium*" (*f*).

The maxims of the Roman Law, "*Pater est quem nuptiæ demonstrant*" (*ff*), and "*cum legitimæ nuptiæ factæ sint, patrem liberi sequuntur*" (*g*), are universally recognized; but the question, what are "*justæ*" or "*legitimæ nuptiæ*," has been, and still is, a subject of much dispute amongst jurists.

(*e*) This presumption of law, Savigny observes, is founded on the dignity and sanctity of marriage—unmarried *concubitus* does not fall under this principle: the father, if not necessarily uncertain, may be so, and the possibility furnishes a complete defence to a charge of paternity.

[(*ee*) According to the Prussian Code (Theil II. tit. ii. §§ 612-617) the father of an illegitimate child is bound to provide maintenance and education.

The enactments contained in Theil II. tit. i. Abschnitt xi.—"Von den rechtlichen Folgen des unehelichen Beischlafes"—have been almost entirely superseded by the Law of April 24, 1854.]

[(*f*) The Emperor Constantine first established that *liberi naturales*, i.e. children born in concubinage, but not *liberi spurii*, should be legitimated by the subsequent marriage of their parents. The tenor, though not the terms, of this constitution has been preserved in a law of the Emperor Zeno (*Codex*, lib. v. t. xxvii. 5), who renewed it, but declared it applicable only to children in existence at the time of the publication of his law. Justinian re-established this method of legitimation as a general principle, and widened its operation. (*Cod.* lib. v. t. xxvii. 10, 11; *Novellæ*, lxxxix. cap. viii.) *Ortolan's Explication Historique des Instituts*, vol. ii. ss. 123, 124 (p. 103, edit. 1870, Paris); *Gera.*v. *Ciantar, L. R.* 12 *App. Ca.* p. 557.]

(*ff*) *Dig.* lib. ii. t. iv. 5. "Pater vero is est quem nuptiæ demonstrant."

(*g*) *Dig.* lib. i. t. v. 19.

DXXXV. Foreign jurists, with few exceptions, hold the doctrine that the question of the *Status* of the child depends upon the Law of the Domicil of his parents (*h*).

But the circumstances, as is well observed by Story, may be very various, admitting and requiring very important distinctions in the application of this general doctrine; and he suggests the following cases as illustrative of this remark.

1. The case of a child born before marriage in the domicil of his parents, who afterwards intermarry in the same domicil, according to the Law of which the child is legitimated by the subsequent marriage.

2. The case of a child born in all these circumstances, but whose parents marry in another State, where there is no such law of subsequent legitimation.

3. The case of a child born before marriage in the domicil of his parents, the law of which does not admit retroactive legitimation by a subsequent marriage, and they, *being there married*, afterwards acquire a new domicil, by the Law of which such subsequent marriage does legitimate the child.

4. The case of a child born before marriage in the domicil of his parents, the Law of which does not allow legitimation by a subsequent marriage; [the parents acquire a new domicil, the Law of which does allow such legitimation, and are afterwards there married (*hh*).]

To these instances another may be added:

5. The case of a child born illegitimate in a State which

(*h*) Their opinions are collected and given at length by *Story, Conflict of Laws*, ss. 93-93 *w*; but he is not quite clear or correct in s. 93 *b*, when he says that because most jurists hold the validity of the marriage to depend on the *lex loci celebrationis*, therefore they hold that the *status* of the child ought to depend upon the same law. States differ very much, as has been shown, with respect to the validity of the marriage being solely dependent upon the *lex loci*; nor is the difficulty quite met by the qualifying words, "at all events if the parents were then domiciled there."

[(*hh*) *Story, ubi sup.* s. 93 *g*.]

does not admit legitimation by subsequent marriage; but the father is domiciled in a State which does admit such legitimation, and he afterwards, retaining his original domicil, marries the mother in the State, the law of which does not allow such legitimation (*i*).

DXXXVI. The conflicting jurisprudence of England and Scotland, the entire variance of two parts of the same empire as to the Law which governs the most important moral and social relations of the inhabitants, has caused this question of legitimacy by subsequent marriage, as well as the question of Divorce, to be elaborately and solemnly discussed in the courts of inferior and superior jurisdiction of Great Britain.

DXXXVII. In the leading case of *Birthwhistle* v. *Vardill* (*ii*), the House of Lords, after a re-hearing, having the unanimous advice of ten of the judges, decided, with respect to a son born of Scotch parents in Scotland before marriage, who afterwards intermarried in that State, and thereby legitimated the son in Scotland, that he was incapable of inheriting *immoveable* property in England.

[The Judges' opinion, at the first hearing, runs thus (*k*):]

"It is said for the appellant, that according to the rule "we adopt, if he is born in lawful wedlock, he fulfils every "condition required of him. Now, they say he is born in "lawful wedlock, because, by a presumption of the Scot- "tish Law, a presumption *juris et de jure*, there was a "marriage anterior to his procreation. It is by force of "this presumption that he is legitimate: by this fiction he "is born within the pale of lawful matrimony. We know "that this fiction is, by respectable writers on the Scottish "Law, represented as accompanying the legitimation *per* "*subsequens matrimonium*; but we do not concede the con- "sequence deduced from it, as applicable to the present

(*i*) *Re Wright's Trusts, vide post*, § dxli.
(*ii*) 7 *Clark & Finn. Rep.* p. 895.
[(*k*) 2 *Clark & Finn. Rep.* at p. 578.]

" question. The question is, what the Law of England re-
" quires; and, as we are advised, the Law of England re-
" quires that the claimant should *actually*, and *in fact*, be
" born within the pale of lawful matrimony; we cannot
" agree that the prescription of a foreign jurisprudence,
" contrary to the acknowledged fact, should abrogate the
" Law of England, and that by such a fiction a principle
" should be introduced which, upon a great and memo-
" rable occasion, the legislature of the kingdom distinctly
" rejected: your Lordships will perceive that I allude to
" the Statute of Merton. It would seem strange to intro-
" duce, indirectly and from comity to a foreign nation, a
" rule of inheritance which may affect every honour and all
" the real property of the realm, which rule, when proposed
" directly and positively to the legislature, it directly and
" positively negatived and refused; a refusal that, in
" England, has obtained the approbation of every suc-
" ceeding age" (*kk*).

DXXXVIII. It is, perhaps, difficult to say that the English Law, which allows a child, born *the moment after* the marriage ceremony has been performed, to be legitimate, promotes a higher standard of morality than the ancient law of the Church adopted by Scotland and most Continental States (*l*), which allows legitimation *per sub-*

(*kk*) *Story* (*ubi sup.* s. 87, note, ss. 93 et seq.) is wholly unable to reconcile the decision in *Birthwhistle* v. *Vardill* with the cases of *Munro* v. *Saunders*, 6 *Bligh's N. Rep.* p. 468, of *Shedden* v. *Patricke*, 6 *Bligh's N. Rep.* p. 487, of *The Strathmore Peerage*, 4 *Wils. & Shaw's Rep. App.* pp. 89, 95, in which cases it has been decided that a person *illegitimate* by the law of the domicil of his birth is illegitimate in England ("*his* domicil of birth" is an ambiguous expression, *vide post*, *in re Wright's Trusts*). The reasoning of Lord Brougham *against* the decision in *Birthwhistle* v. *Vardill* deserves careful study, 9 *Bligh's N. Rep.* pp. 70–86; s. c. 2 *Clark & Finn. Rep.* pp. 582–600; [*Hosack's Conflict of Laws*, p. 63.]

[(*l*) Prussian Code, Theil II. tit. ii. § 596. "Wenn ein Schwängerer die Geschwächte, auch ohne Prozess und Erkenntniss, wirklich heirathet, so erlangt das aus dem unehelichen Beischlafe erzeugte Kind, eben dadurch, in allen durch besondere Gesetze nicht ausdrücklich

sequens matrimonium; or that the Statute of Merton, considering the epoch at which it was passed, or, rather, proclaimed, and the object of the Barons who proclaimed it, ought to be holden in very great esteem. Unquestionably, the state of the Scotch and English Law, both on this subject and on the question of Divorce, is disgraceful to the jurisprudence of a civilized country. It is to be remembered that the judges founded their refusal to give full effect to the Foreign Law upon a question of *Personal*

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ausgenommen Fällen, die Rechte und Verbindlichkeiten eines ehelichen."

French *Code Civil*, liv. i. tit. vii. art. 331. "Les enfants nés hors mariage, autres que ceux nés d'un commerce incestueux ou adultérin, pourront être légitimés par le mariage subséquent de leurs père et mère, lorsque ceux-ci les auront légalement reconnus avant leur mariage, ou qu'ils les reconnaîtront dans l'acte même de célébration;' and see Articles 332–339.

Dutch Civil Code (*Burgerlijk Wetboek*), art. 327, follows the French code. "Kinderen buiten huwelijk verwekt, met uitzondering van degene die in overspel of in bloedschande zijn geteeld, worden door het opvolgend huwelijk van hunnen vader en hunne moeder gewettigd, wanneer deze hen, voor het aangaan des huwelijks, wettiglijk hebben erkend, of wanneer die erkenning plaats heeft bij de akte van voltrekking zelve."

The Italian *Codice Civile*, having provided that natural children cannot be "recognized" (riconosciuti) when born of an adulterous connexion, or of parents who may not intermarry by reason of kinship or affinity (art. 180), proceeds to enact as follows:—

Art. 194. "La legittimazione attribuisce a colui che è nato fuori di matrimonio la qualità di figlio legittimo.

"Essa si opera per susseguente matrimonio contratto fra i genitori del figlio naturale, o per decreto reale."

Art. 195. "Non possono essere legittimati per susseguente matrimonio, nè per decreto reale, i figli che non possono essere legalmente riconosciuti."

The Austrian Code (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erblünder der Oesterreichischen Monarchie*) enacts:—

Art. 161. "Kinder, welche ausser der Ehe geboren und durch die nachher erfolgte Verehelichung ihrer Aeltern in die Familie eingetreten sind, werden, sowie ihre Nachkommenschaft, unter die ehelich erzeugten gerechnet; nur können sie, den in einer inzwischen bestandenen Ehe erzeugten ehelichen Kindern, die Eigenschaft der Erstgeburt, und andere bereits erworbene Rechte, nicht streitig machen."]

Status, upon the express ground that the recognition of it in this case would contravene a fundamental law of the country, and, therefore, be without the pale of Comity (*m*).

DXXXIX. In other later cases (*n*) it has been holden by the House of Lords, that a child born before marriage of parents domiciled in a State, the law of which did not allow legitimation *per subsequens matrimonium*, would not become legitimate, for the purpose of inheriting *immoveable property*, by the marriage of his parents in another country, which did allow legitimation *per subsequens matrimonium*; and it was intimated that the change of the domicil of the parents to the State where the marriage was celebrated would not have altered the decision.

DXL. The Law of France differs in this matter from the Law of England (*o*). It has been decided that a bastard cannot be made legitimate if at the time of its *conception* or *birth* the parents were incapable of *contracting* to legitimate the child after its birth. But this does not seem to mean an incapacity of the law of the parents' domicil, but such a personal incapacity as a previous marriage (*oo*).

(*m*) So Littledale, J., observed on this case in the King's Bench. "The very rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the *consequences* of that *status* are sought to be enforced."—5 *Barnewall & Cresswell's Rep.* p. 455.

This ground does really constitute the defence of the judgment. In England, it is to be recollected, consequences of great political and constitutional moment flow from territorial possession.

(*n*) *Munro* v. *Saunders*, 6 *Bligh's N. Reports*, p. 468.

Rose v. *Rose*, 4 *Wilson & Shaw's Reports*, p. 289, and Appendix, pp. 33-89.

Story, ubi sup. s. 93 *et seq.*

(*o*) *Merlin, Quest. de Droit*, "Légitimation," II. s. 2. The case of *De Conty-Duquesnoy*.

[(*oo*) See art. 331 of the *Code Civil* cited *suprà*, § dxxxviii. note (*l*), and arts. 332-339. *Pothier, Traité du Mariage*, partie v. chap. ii. arts. 409-421. *Merlin, Rép.* Légitimation, II.

Demolombe (*Cours de Code Napoléon*, tome v. p. 365), referring to art. 331, says: "La règle est donc que tout enfant né hors mariage est

DXLI. Story remarks that the result of the English case last cited seems to be, that the law of the place of the birth of the child, and not the law of the place of the marriage of the parents, decides whether a subsequent marriage will legitimate the child or not (*p*). But a most important decision by Vice-Chancellor Wood in an English Court of Equity conclusively establishes that, in England, the Law of the domicil of the father at the time of the birth of the child decides the question of legitimation.

The substance of this decision was that a domiciled Englishman, being the putative father of an illegitimate child, born in France of a Frenchwoman, and afterwards becoming domiciled in France, cannot, on his subsequent marriage with the mother of the child, legitimate the child under the provisions of the French Law so as to enable it to share in a bequest to his children contained in the will of a person in England.

The reasons for this decision were—

1. That marriage, being a personal contract, is like other personal contracts regulated by the Law of the domicil of the party.

2. That the Law of the domicil of the putative father attached to the child at its birth, and by that law its bastardy was indelible.

3. That by the Law of France a bastard cannot after-

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susceptible de recevoir le bienfait de la légitimation ; il n'y a d'exception que contre les fruits de l'inceste et de l'adultère."

"Quelques auteurs ont enseigné, même sous l'empire de notre Code, qu'il faut, pour que la légitimation soit possible, *que les père et mère aient pu se marier ensemble au moment de la conception des enfants.* . . . Mais cette proposition ainsi formulée est évidemment trop générale."

After stating that under the Roman law this rule prevailed, he continues :—"Quoi qu'il en soit, au reste, du droit antérieur sur ce point, il me paraît certain que cette prétendue règle ne saurait être posée en présence de l'article 331 du Code Napoléon."]

(*p*) The opinions of the Scotch judges, whose decision the House of Lords reversed in *Rose* v. *Ross*, contain much argument in favour of an opposite conclusion.

wards be made legitimate, if, at the time of its conception, the parents were incapable of contracting to legitimate the child after its birth, and a domiciled Englishman could not bind himself to such a contract.

4. That by the Law of France a bastard can never be made legitimate, if it is uncertain who was the father; and a domiciled Englishman by the law of this country cannot, for civil purposes, be more than the *putative* father of a bastard child (*q*).

[DXLI.A. In *Munro* v. *Munro* (*r*), where both the birth of a daughter out of wedlock, and the subsequent marriage between her parents, took place in England, but the domicil of the father throughout was Scotch, it was held by the House of Lords, sitting in appeal from the Scotch court, that the father's domicil fixed the *status* of the daughter, who was therefore, so far as to enable her to inherit land in Scotland, declared legitimate. In the case of *Re Goodman's Trusts* (*s*) the domicil of the parents was Dutch; the birth of the child and the subsequent marriage took place in Holland, by the Law of which country a natural child is legitimated *per subsequens matrimonium*. The Court of Appeal (James and Cotton, L.JJ., Lush, L.J., *dissentiente*), overruling the decision of Jessel, M.R., held that the child could share as next of kin in the estate of an intestate who at the time of death had an English domicil. This decision was followed by Fry, J., in *Forrestier* v. *Buddicom* (*t*), in the case of a child legitimated by French Law; and by Kay, J., in *Andros* v. *Andros* (*u*), under the Law of Guernsey. In the two last-named cases the claims allowed were made by legatees and not by next of kin, but the same principle was applied.

(*q*) *Re Wright's Trusts* (1856), 2 *Kay & Johnson's Rep.* p. 595; 2 *Jurist, N.S.*, p. 465; 25 *Law Journal, N.S.*, p. 623.

[(*r*) 7 *Clark & Fin.* p. 842. *Vide antè*, § ccxxviii.

(*s*) *L. R.* 17 *Ch. D.* p. 266.

(*t*) *Weekly Notes*, 26th November, 1881.

(*u*) *L. R.* 24 *Ch. D.* p. 637.]

In *Atkinson* v. *Anderson* (*v*) the father accorded "recognition" to his illegitimate children, but never married their mother. He was originally English, but had become domiciled at Rome, where, previously to the annexation of the Papal States by Italy in 1870, the births had taken place. By the law of the Papal States, "recognition" of illegitimate children conferred on them the right to succeed to property, but did not legitimate them. The children took the proceeds of sale of certain real estate in Cumberland, under a devise to them by name made by their father in the English form; but it was held that they took as strangers in blood by virtue of the will, and must pay succession duty at the rate of 10 per cent.]

DXLII (*w*). *Legitimation by the authority of the State*, evidenced by some public act, as in England by an Act of Parliament, or in other countries by the decree of the Sovereign (*per rescriptum principis*) (*ww*), might give rise to an international question of some nicety, though reason and principle are in favour of the recognition by other countries of such legitimation, where it is valid *lege domicilii*. As to immoveable property, the rule respecting such legitimation would, perhaps, be liable to the same restrictions as the legitimation by sentence of a court of justice. The authority of Schäffner (*x*), however, is opposed even to this limitation; he is of opinion that the *legitimatio per rescriptum principis* is good and valid everywhere, if good and valid by the Law of the domicil, and that the *lex loci rei sitæ* has no bearing upon the question, which is one purely of *Status*.

[(*v*) *L. R.* 21 *Ch. D.* p. 100.]

(*w*) *Pütter, Fremdenrecht*, Theil ii. Kap. ii. § 60.

[(*ww*) See *Gera* v. *Ciantar*, *L. R.* 12 *App. Ca.* p. 557.]

(*x*) *Entwickelung des Intern. Privatrechts*, § 40: "Die Frage scheint unbedingt bejaht werden zu müssen." He cites *Anton. de Roselli's tract. De Legit.* (*in Oceano juris*), i. 2, n. 24.

P. Voet, De Stat. sect. iv. c. iii. num. 15.

Le Bret, Quest. notables, liv. iii. *décis.* 7; *Boullenois*, tit. i. c. ii. obs. 4.

CHAPTER XXV.

GUARDIANSHIP.

DXLIII. GUARDIANSHIP is the next Relation of Family which requires consideration (*a*).

This subject admits of two principal divisions:—

First, as to the choice or constitution of the Guardian.

Secondly, as to his power when chosen or constituted.

The last head is again divisible into considerations respecting—1, the person; 2, the property of the Ward.

The Ward may be either a minor (*b*), or a lunatic, or a person placed under the control of a Guardian on account of his excesses—a category not recognized by the Law of England (*c*).

DXLIV. And, first, with respect to the choice and constitution of the Guardian.

Upon the general question, Vattel says that "it belongs

(*a*) *Savigny*, *R. R.* viii. s. 380, s. 396, num. 3, Vormundschaft. *Bar*, § 106. *Wharton*, ch. vi.

Rocco, lib. i. cap. v. pp. 52–59; lib. ii. cap. xxvii. pp. 241–245, &c.

Fœlix, liv. ii. t. i. c. ii. and c. iv. Des Quasi-Contrats.

Pütter, *ibid.* Theil ii. Kap. iii. Von der Fremden Vormundschaft.

Wächter, *Die Collision*, *&c.*, s. 23, *Archiv*, Band xxv.

Schäffner, § 41.

Story, *Conflict of Laws*, ss. 492–506.

As to questions of *Domicil* between Guardian and Ward, *vide antè*, ch. ix.

See, also, *De Martens' Droit des Gens*, liv. iii. ch. ii. s. 98.

(*b*) *Fœlix*, liv. ii. tit. i. s. 88, tit. vii. s. 456.

"Ainsi en France" (he says) "la nomination du tuteur d'un mineur est rangée dans la catégorie des actes de juridiction volontaire."—s. 456.

(*c*) *Vide infrà*, chap. xliv., for the distinction between contentious and voluntary jurisdiction.

" to the domestic judge to nominate tutors and guardians " for minors and idiots. The law of nations, which regards " the common advantage and the harmony of States, re- " quires therefore that such nomination of a tutor or guar- " dian be valid and recognized in all States in which the " ward may have business to transact " (*où le pupille peut avoir des affaires*) (*cc*).

The reason and the law of most modern States are stated with great perspicuity by Vinnius:—" Tutela ex eorum " numero est " (he says) " quæ *in genere* et quasi *in abstracto* " sunt *juris gentium*, et *in concreto juris civilis*. Nam ut " ineuntis ætatis inscitia atque imbecillitas alterius pro- " vectioris prudentiâ atque arbitrio constituatur ac guber- " netur, juri naturali conveniens est, quod et apud omnes " gentes procul dubio observatur. At forma regendi, " qualitas personæ tutoris, ejusque constituendi modus, " potestatis quam habet circumscriptio, hæc omnia sunt " juris civilis, prout quæque civitas ordinaverit " (*d*).

DXLV. The reason of the thing seems to point out that guardianship, in its origin, was an institution of natural law: " Impuberes autem in tutelâ esse naturali juri con- " veniens est: ut is qui perfectæ ætatis non sit, alterius " tutelâ regatur " (*e*); the institution rises indeed, on account of its intrinsic importance, to the dignity of a public concern (*munus publicum*), but its root is in the natural relation of family.

The Guardian is put over the person and property of the Ward; he ought to be a person chosen by the family, and out of the family, as having a natural interest in the protection of both. Such was the doctrine of the statesmen of France, as appears in the discussions which preceded the introduction of the law upon this matter into

(*cc*) Book ii. ch. vii. s. 85.

(*d*) *Comment. Instit. Tit. de Atiliano tutore*, cited in *Rocco*, p. 54 (lib. i. cap. v.).

(*e*) *Instit.* lib. i. t. xx. 6.

the *Code Napoléon* (*ee*). They borrowed in this, as in other respects, their wisdom from Domat, who considered guardianship as belonging to the class of obligations contracted without positive convention, imposed, like that of parental duty, by the eternal laws of nature and the interests of all civilized society, which do not suffer the abandonment of orphans; and he laid down that it was according to natural feeling that the guardian, both for person and property, should be chosen out of the connexions of the ward.

DXLVI. This subject has, in fact, been considered by all nations, unless we except the earliest periods of ancient Rome, as appertaining in a greater or less degree to considerations of Public Policy, as well as to those which concern Private Rights.

Throughout Germany it has obtained almost exclusively the former character. The State interferes to exercise, by the appointment of a guardian, that care over the helpless and imbecile, which is one of the primary objects of its institution (*f*); nor is this public character of guardianship affected by the circumstance that some of the consequences of this public trust fall under the category of Private Rights (*ff*).

[(*ee*) *Locré, Législation*, tome vii.]

[(*f*) See the Prussian Code, Theil I. Titel i. § 32. "Diejenigen, welche wegen noch nicht erlangter Volljährigkeit, oder wegen eines Mangels an Seelenkräften, ihre Angelegenheiten nicht selbst gehörig wahrnehmen können, stehen unter der besondern Aufsicht und Vorsorge des Staates."

§ 33. "Der, welchem der Staat die Sorge für die Angelegenheiten solcher Personen aufgetragen hat, wird Vormund genannt."]

(*ff*) The subject is very fully treated in the *Institutes*.

Lib. i. t. xiii. *De tutelis.*

,, t. xiv. *Qui testamento tutores dari possunt.*

,, t. xv. *De legitimâ agnatorum tutelâ.*

,, t. xvii. *De legitimâ patronorum tutelâ.*

,, t. xix. *De fiduciariâ tutelâ.*

,, t. xx. *De Atiliano tutore et eo qui ex lege Juliâ et Titiâ dabitur.*

Et vide tt. xxi, xxii, xxiii, xxiv, xxv, and xxvi.

DXLVII. The jurisprudence of the Kingdom of the Two Sicilies upon the reception of the Law of Foreign Guardianship was, as on other matters of Comity, enlightened and just.

This jurisprudence ranked Guardianship among the *munera publica*, indeed, but among those *quæ respiciunt rem privatam*, and therefore, though it excluded foreigners from the discharge of offices affecting the Government of the State (*rem publicam*), it admitted them to the discharge of the office of Guardianship with some just limitations. Foreigners were, as a general rule, recognized as guardians over the persons both of foreigners and of native subjects; but in cases where the interests of native subjects were concerned, those foreigners only who had by some public act of the State been admitted to a domicil in the State, and not those who were merely residents (*semplicemente residenti*) (*g*).

Whatever may be the differences in the Positive Laws of different States with respect to the mode of constituting a guardian, the rule of International Comity imperatively demands that a guardian duly constituted according to the Law of the domicil of the ward should be recognized as such by all other countries.

In the case of the minor that domicil is usually identical with that of the deceased father. The case of the lunatic will be presently considered.

DXLVIII. Secondly, with respect to the power of the Guardian over the *person* of the Ward.

The jurisprudence of England upon almost every branch of the subject of Foreign Guardianship has been till recently unsatisfactory and at variance with the principles of International Comity (*h*). Still more so is the juris-

(*g*) *Rocco*, pp. 58, 59.

(*h*) *Johnstone* v. *Beattie*, 10 *Cl. & Finnelly's Rep.* p. 42, in which an unsuccessful attempt was made to establish the authority of a foreign guardian over a ward. But in this case Lords Brougham and Campbell were opposed to Lords Lyndhurst, Cottenham, and Langdale;

prudence of the United States of North America. In them the rights and powers of guardians are considered as bounded by the locality in which they are constituted, and as not extending in any degree to their wards in other States (*hh*); upon the same reasoning and principle, it is said, as those which circumscribe the power and right of the Foreign Executor or Administrator. This, to be sure, seems barbarous enough (*i*).

DXLIX. In an English case (*k*), where it appeared that A. B., the infant daughter of a British subject, (who had emigrated to and had procured letters of naturalization in America, and *who had married an American lady*, whose real estate A. B. inherited,) after an injunction had been granted by the Supreme Court of New York to restrain the removal of the infant from that jurisdiction, and after the appointment by the Surrogate of New York of a maternal aunt as guardian, had been clandestinely removed from her residence and brought to England by paternal relatives—the English Court, on petition by the maternal aunt claiming the custody of the infant, and on cross petition by the paternal relatives praying the appointment of other guardians, appointed the maternal aunt and two paternal relatives guardians.

The order of the Surrogate of New York, it was said, appointing a guardian, will be recognized, and treated with the respect due, by the Comity of nations, to the order of the foreign Court; but it does not confer on the appointee the office of guardian in this country.

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and it would seem to be, as I have said, corrected by *Stuart* v. *Bute*, 9 *H. L. C.* (1861), at pp. 463-470.

Lord Hardwicke had been inclined to a more liberal view, *Ex parte Otto Lewis*, 1 *Vesey Sen.* p. 298.

[(*hh*) See *Lamar* v. *Micou*, *Davis' U. S. A. Rep.* vols. v. p. 452, vii. p. 218.]

(*i*) *Story*, s. 499, citing *Morrell* v. *Dickey*, 1 *Johns.* (*Americ.*) *Ch. Rep.* p. 153; *Kraft* v. *Wickey*, 4 *Gill & Johns.* (*Americ.*) *Rep.* p. 332.

(*k*) *Dawson* v. *Jay* (1854), 1 *Jurist, N. S.* p. 39; s. c. 2 *Smale & Giffard's Rep.* p. 199; 3 *D. M. & G.* p. 764.

DXLIX.A. In the important case of *Stuart* v. *Bute* (*l*), decided in 1861, the following were the propositions of fact and law:—

"A. was the son of a person who was at once a Peer "of the United Kingdom and a Peer of Scotland. A. "was born in September 1847. A.'s father had estates in "both countries, and resided at intervals in both. He died "in England, in March 1848. A.'s mother was, in May "1848, appointed by the Court of Chancery his guardian, "and A.'s uncle (the heir presumptive to the title) was "appointed Tutor at Law in Scotland. This appointment "gave him no right to the custody of the infant's person, "but only conferred on him the management of the pro- "perty till the infant should become fourteen years of age. "A.'s mother died in Scotland, in December 1859. By "the will of the mother, S. and M. were appointed guar- "dians, and that appointment was confirmed by the Vice- "Chancellor, by whom a scheme for the infant's education "was prepared and approved of. A. was then in Scotland, "under the personal care of M. She promised to bring "him to England to be educated, as S. proposed, in accor- "dance with the scheme of the Court of Chancery. She "brought him to London, but, in consequence of disagree- "ments between herself and S., suddenly carried him back "to Scotland. Proceedings in the Court of Session were "instituted, to compel her to give up the custody of the "infant to S.; but though the Court of Chancery had, on "the application of S., directed that A. should be brought "back to England to be educated, the Court of Session "pronounced an interlocutor, postponing the case for "nearly four months; and afterwards two other inter- "locutors, interdicting anybody whatever from taking the "infant, 'a domiciled *Scotch* subject,' out of the jurisdic- "tion of the Court of Session."

The Lord Chancellor (Lord Campbell), in delivering his judgment in the House of Lords, said:—

(*l*) 9 *H. L. C.* p. 440.

"The Court of Session had undoubted jurisdiction over "the case. By their *nobile officium*, conferred upon them "by their sovereign as *parens patriæ*, it is their duty to "take care of all infants who require their protection, "whether domiciled in Scotland or not. But I venture to "repeat, what I laid down for law in this House nearly "twenty years ago (*m*), that 'the benefit of the infant, "'which is the foundation of the jurisdiction, must be the "'test of its right exercise.' Can any human being doubt "that on the 20th of July, 1860, it would have been for "the benefit of the infant Marquis of Bute that he should "be taken from the custody of Lady Elizabeth Moore and "the nurse, and sent to a public school, under the super-"intendence of General Stuart, who had been selected as "guardian, with the consent of the whole Bute family, "and whom Lady Elizabeth herself had described as so "peculiarly well qualified to act as guardian to a young "nobleman?

"The refusal to interfere is rested on the decision of "this House in *Johnstone* v. *Beattie*, and I do sincerely be-"lieve that that decision was the true cause why the Court "of Session in this case refused to interfere. I regret "that decision, and I must confess that in some of the "proceedings in that case, and in the language of some "members of your Lordships' House who took part in "that decision, there was ground for the Scotch judges "apprehending that the Court of Chancery was encroach-"ing on their jurisdiction. The application for English "guardians there made was certainly with an intention, "which the parties making it entertained, to supersede "the Scotch guardians who had been duly appointed to "the female child in Scotland under her father's will—"she being domiciled in Scotland—being in England only "for a temporary purpose—having landed estates in Scot-"land—having no property whatever in England—there

(*m*) *Johnstone* v. *Beattie*, 10 *Clark & Finn. Rep.* at p. 122.

" being a prayer in the bill for appointing English " guardians, so that the Scotch guardians should account " to them, and there being no suggestion that the Scotch " guardians had in any respect misconducted themselves, " or were in any respect incompetent to take charge of " her education. But all that can be considered as judi- " cially decided by the House was, that if there be a foreign " child in England, with guardians duly appointed in the " child's own country, the Court of Chancery may, without " any previous inquiry whether the appointment of other " guardians in England is or is not necessary, and would " or would not be beneficial for the child, make an order " for the appointment of English guardians. Allowing " the jurisdiction of the Court of Chancery, I thought that " it was not properly exercised for the good of the infant, " and that such an exercise of it was a dangerous pre- " cedent for the appointment of guardians to any foreign " child residing casually in England for health, education, " or amusement, the necessary consequence of which is " that the ward, till reaching the age of twenty-one, can- " not leave the realm of England without leave of the " Court of Chancery. But the House did not decide, and " no member of the House said, that foreign guardians " are to be entirely ignored, or laid down anything to " countenance the notion that a guardian who has been " duly appointed in a foreign country, and who comes into " England or Scotland to reclaim a ward stealthily carried " away from him, is to be treated as a stranger and an " intruder. On the contrary, an alien father whose child " had been so carried away from him, and brought into " England, would undoubtedly have the child restored to " him in England by a writ of *habeas corpus*; and I be- " lieve that the same remedy could be afforded to a foreign " guardian, standing *in loco parentis*, on the ravishment of " his ward."

Lord Langdale, one of the Lords who concurred in the

judgment of the House in *Johnstone* v. *Beattie* (*n*), said:—
"If it should unhappily become necessary to call upon
"the Courts of the two countries to exercise their powers,
"I know of nothing which would render it impracticable
"for the English Court of Chancery to order the guardian
"resident in England to deliver up that infant to the
"guardian resident in Scotland. And why should we
"doubt that the Scotch Courts would consider beneficial
"to the infant the same course of management which,
"upon evident consideration, had been approved by the
"English Court of Chancery, and, if necessary, order the
"guardian resident in Scotland, being the tutor or curator
"there, to deliver up the infant to the guardian resident
"in England? I cannot anticipate differences of opinion,
"or that either of the Courts would have any difficulty
"in directing that which would be most beneficial to the
"infant. It is not reasonable to suppose that the Courts
"of the two countries would conflict in such a matter. If
"difficulties should occur, they must be met as they best
"may, by adopting that course which, under the circum-
"stances, shall appear to be for the benefit of the infant.

"I must use the freedom to observe, that whatever
"opinion the Scotch judges may justly form of the decision
"of this House in *Johnstone* v. *Beattie*, they would have
"acted with more dignity, and more magnanimously, as
"well as more judiciously, if they had calmly and promptly
"considered what was for the benefit of the infant, and
"had recollected that a Court may not only be censured
"for exceeding its jurisdiction, but for declining to exercise
"its jurisdiction for the relief of a suitor, from the appre-
"hension that, in another cause, its jurisdiction has been
"unjustifiably enroached upon by another Court.

"I can take upon myself to say that *Johnstone* v. *Beattie*,
"whether properly or improperly decided, is no authority
"whatever for the interlocutor of the 20th July appealed

(*n*) 10 *Cl. & Finn. Rep.* p. 145.

"against. In perfect harmony with that decision, the "petition praying for the restitution of the ward to the "guardian might have been immediately granted."

Lord Cranworth said:—"I would make a passing ob- "servation upon the case of *Johnstone* v. *Beattie*. Perhaps "it might have been a decision more consonant to the "principles of general law to have held there that every "country would recognize the status of guardian in the "same way as it undoubtedly would recognize the status "of parent, or the status of husband and wife. But sup- "posing that not to have been the view taken by this "House, there is nothing in that decision that could have "been decided otherwise, or that could at all interfere "with or touch the present question. For all that was "decided there was, that the status of guardian not being "a status recognized by the law of this country unless "constituted in this country, it was not a matter of course "to appoint a foreign guardian to be English guardian; "but that that was only a matter to be taken into consi- "deration. That was all that was decided in that case; "and whether or not (as I have already said) it might "have been better to hold that the status of guardian was "to be itself recognized without further inquiry, is quite "immaterial to the present question" (*o*).

A subsequent English case was decided (1866) by Vice-Chancellor Page Wood. In it the cases of *Stuart* v. *Bute* and *Dawson* v. *Jay* were referred to, and the following propositions of Law were laid down:—

"The Court will not from any supposed benefit to infant "subjects of a foreign country, who have been sent to this "country for the purposes of education, interfere with the "discretion of the guardian who has been appointed by a "foreign Court of competent jurisdiction, when he wishes "to remove them from England in order to complete their

(*o*) *Stuart* v. *Bute* (*Marquis*); *Stuart* v. *Moore*, 9 *H. L. C.* pp. 463, 465, 470.

" education in their own country. But the Court refused " to discharge an order by which guardians had been ap- " pointed over the children in this country, and merely " reserved to the foreign guardian the exclusive custody " of the children, to which he was entitled by the order " of the Court of his own country " (*p*).

In support of these propositions, the Vice-Chancellor said :—" Having regard to the principles of International " Law, and the course that all Courts have taken of re- " cognizing the proceedings of the regularly constituted " tribunals of all civilized communities, and especially of " those in amicable connexion with this country, it is im- " possible for me entirely to disregard the appointment of " a guardian by an Austrian Court over these children, " who are Austrian subjects, and children of an Austrian " father, merely because those who preceded Signor Vetzera " in his guardianship have taken the course of sending the " children over to this country for the purpose of educat- " ing them, seeing that he is now desirous of revoking that " arrangement. I am now asked, in effect, to set aside " the order of the Austrian Court, and declare that this " gentleman, so appointed, cannot recall his wards who " have been sent to this country for the purpose of their " education. It would be fraught with consequences of " very serious difficulty, and contrary to all principles of " right and justice, if this Court were to hold, that when " a parent or guardian (for a guardian stands exactly in " the same position as a parent) in a foreign country avails " himself of the opportunity for education afforded by this " country, and sends his children over here, he must do it " at the risk of never being able to recall them, because " this Court might be of opinion that an English course " of education is better than that adopted in the country " to which they belong. I cannot conceive anything more " startling than such a notion, which would involve, on

(*p*) *Nugent* v. *Vetzera*, *L. R.* 2 *Eq.* p. 704.

"the other hand, this result, that an English ward could "not be sent to France for his holidays without the risk "of his being kept there and educated in the Roman "Catholic religion, with no power to the father or guardian "to recall the child. Surely such a state of jurisprudence "would put an end to all interchange of friendship be- "tween civilized communities" (*r*).

. . . . . .

"It is now sought to prevent Signor Vetzera from re- "moving the children so sent to this country for their "education, on the plea that this Court has appointed "guardians here in England (for which the jurisdiction is "not to be disputed), and that having so appointed them, "the Court will do no more than look at what is most for "the benefit of the infants.

"*Lord Bute's* case (*s*) is cited for the purpose of showing "that I ought, if satisfied that it is more for the interest "of the infants that they should remain here than be sent "back to their own country, to supersede the authority "of the foreign guardian and the authority of the Court "that has appointed him, which takes care of the educa- "tion of its own subjects, and directs how it shall be "carried into effect. It appears to me that no doctrine "of that kind was in any way propounded in *Lord Bute's* "case, and certainly the other authority referred to, of "*Dawson* v. *Jay* (*t*) (called the American case), has no "bearing upon the subject."

. . . . . .

"The case apparently nearest in principle, perhaps, "though not, on examination, to be compared with it, is "that in which a Roman Catholic parent, abandoning his "child to Protestant instruction for several years, has "sought to change its course of education and bring it

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(*r*) *Nugent* v. *Vetzera*, *ubi sup.* p. 711.
(*s*) 9 *H. L. C.* p. 440.
(*t*) 3 *D. M. & G.* p. 764.

"back to its own form of religion. There the Court would "not allow the child's religious principles to be disturbed "by changing the course of instruction under which it "had so long been allowed to remain, holding that the "father had, in effect, abandoned his right of choice. But "that is not the case here. I see nothing on the facts to "induce me to suppose that either this gentleman as "guardian, or the Courts of Austria, in exercise of their "rights over their own subjects, have at all abandoned "these children, merely because they have allowed them "to be educated for some four or five years in this country "where it was thought they could be best educated. To "hold otherwise would render it most unwise for any "foreign country to send her subjects to this country, as "this Court might say that the Queen of England, as "*parens patriæ*, can see to the education of children better "than the Emperor of Austria, as *parens patriæ* within his "own dominions, can. The same authority which we "claim here on behalf of the Crown, as *parens patriæ*, is "claimed by every other independent State, and should "not be interfered with except on some grounds which I "do not think it necessary to specify, guarding myself, "however, against anything like an abdication of the "jurisdiction of this Court to appoint guardians. With "respect to the English guardians of these children, I "hold that the Court has power to appoint them, and I "continue those that have been appointed. The case "may well happen of foreign children in this country, "without any one to look after or care for them, or who "may require the protection of this Court to save them "from being robbed and despoiled by those who ought to "protect them. These children, on the other hand, seem "to have met with nothing but kindness from their "relations on all sides; but it may be desirable that, so "long as they remain in this country, they should have "the protection of guardians living within the jurisdiction. "Out of respect to the authority of the Austrian Courts,

"by which this gentleman has been appointed, I reserve "to him, in the order I am about to make, all such power "and control as might have been exercised over these "children in their own country if they were there, and had "not been sent to England for a temporary purpose. "Taking that view of the case, I have not asked to see "the children. I could not be influenced by anything I "might hear from them. I assume that they are most "anxious to remain here and not to go back to their own "country; but I have no right to deprive the guardian "appointed by the foreign Court over them of the control "which he has lawfully and properly acquired, has never "relinquished and never abandoned, and under which "authority alone they have remained here, and been "maintained and supported here" (*x*).

In *Di Savini* v. *Lousada* (*y*), Vice-Chancellor James held that when an infant, a citizen of a foreign country, is sent to England, the English Court will execute in all respects the orders of the Courts of the foreign country in regard to the infant, if they are not inconsistent with English Law.

In this case the infant had been sent over to England by the foreign guardian with the consent of the foreign Court, on the express condition that her religious opinions should not be interfered with, and certain English guardians were then appointed. The Vice-Chancellor, on an application made by the foreign guardian, under the direction of the foreign Court, discharged the English guardians, on the ground that they were improperly influencing the religious opinions of the infant, and appointed other English guardians in their stead.

DL. According to Lord Kames (*z*), the Scotch Law holds that the choice of a guardian or curator made in

(*x*) *Nugent* v. *Vetzera*, *ubi sup.* pp. 713-15.
(*y*) 18 *Weekly Reporter*, p. 425 (1870); 22 *Law Times*, p. 61.
(*z*) *Equity*, Book iii. c. viii. s. 1 (p. 490 of edition 1825).
Ib. s. 4, cited in *Story*, *Conflict of Laws*, s. 503.

England is recognized as effectual in Scotland: not, however, meaning to extend this doctrine to immoveable property of the ward (*zz*).

DLI. According to the Law of England, [guardianship in most instances rests either on Common Law, on Statute, or on appointment by the High Court of Justice.

By the Common Law there are three kinds of guardianship (*a*), viz.:]

(1) Guardianship by Nature;

(2) Guardianship in Socage; and,

(3) Guardianship for Nurture;

the first and last of which are often confounded, and used in a loose and indeterminate sense.

1. *Guardianship by Nature* is of the heir apparent only (and not of all the children), and belongs to the father and mother and other ancestor standing in that predicament to the infant. It lasts until twenty-one years of age, and extends no further than the custody of the infant's person.

2. *Guardianship in Socage* arises wholly out of tenure, and exists only when the infant is seised of lands or other hereditaments holden by socage. It extends to the person and all the hereditaments (including the socage estates) of the infant, and lasts until the infant arrives at the age of fourteen. It belongs to such of the infant's next of blood as cannot have by descent the socage estate (*b*) in

[(*zz*) See *In re Willoughby*, *L. R.* 30 *Ch. D.* p. 324, a case in which the English Court appointed guardians to an infant, English by nationality, but French by domicil, resident in France, having property there, and having none in England. The father was dead, and by the French Law the mother would have been guardian; she had, however, lived apart from her husband, and during his life had been prohibited by the French Courts from access to the child. The French Courts postponed action pending the decision of the English Courts.]

(*a*) See *Mr. Hargrave's* learned notes, 12 and 13 to *Co. Litt.* Lib. ii. cap. 5, sect. 123 (88 *b*).

(*b*) The jealousy of the feudal law disqualifying on the ground that the Civil Law qualifies for guardianship—viz. the guardian's contingent interest in the estate.

respect to which the guardianship arises, by descent, without any distinction between the whole blood and the half blood.

[These two kinds of guardianship rarely occur.]

3. *Guardianship for Nurture* occurs only when the infant is without any other guardian, and none can have it except the father or mother. It lasts until the age of fourteen years, and extends only over the person. [But though, after the age of fourteen, the parent may not be properly designated "guardian for nurture," yet he, or she, is now understood to stand substantially in that capacity, and to have the care and control of the person of the infant up to the age of twenty-one.] (c)

DLII. The Guardian for nurture is entitled to the custody of the child; and a writ of *habeas corpus* is the proper proceeding on the part of such guardian, to recover the custody of the child improperly detained from him.

The Common Law for this purpose recognizes no distinction as regards the discretion of the children between the ages of seven and it should seem *sixteen* (d). The Courts, therefore, will not, where a child between those ages has been brought up under a writ of *habeas corpus*, obtained by the mother, a widow, who was the Guardian for nurture, examine the child in order to ascertain whether there is mental capacity sufficient to exercise a choice, and, if so, the wishes of the child; but will at once restore the child to the custody of the guardian, unless it appears that the guardian, either by past immoral conduct or a want of *bona fides* in making the application, or by having some illegal intention or purpose in view, has forfeited her right to the custody of the child.

(c) 2 *Stephen's Blackst. Com.* Book iii. chap. iv. sec. 2; 2 *Fonbl. Eq.* Book ii. pt. ii. ch. ii. s. 2, note (*h*).

(d) See *Regina* v. *Howse*, 7 *Jur. N. S.* p. 22; s. c. nom. *Ex parte Barford*, 8 *Cox, C. C.* p. 405; *Re Hakewell*, 12 *C. B. Rep.* p. 223. *Fourteen* appears to have been the age formerly fixed upon; see next page, *Ex parte Alicia Race.*

In the leading cases of *Alicia Race* (*e*) and *Regina* v. *Howse* (*f*), these doctrines were very solemnly laid down by the Queen's Bench: it was holden in the former case that the intention of the mother, herself a Roman Catholic, to remove the child from a Protestant establishment to a Roman Catholic seminary, is not enough to affect her right to the custody of the child as Guardian for nurture, though the father of the child lived and died in the Protestant faith, and had brought up his children in the same faith; there being no directions of the father, by will, that the children should continue to be educated as Protestants (*ff*).

[*Guardianship by Statute* is based upon the Act abolishing feudal tenures (12 Car. II. c. 24) and the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). The former Act empowers a father to appoint by deed or will guardians to his unmarried children up to the age of twenty-one, having the custody of their persons and of their estates both real and personal. The latter constitutes a widow guardian of her children, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by him. The same Act gives to a mother in a modified degree the powers of appointment possessed by a father.

Guardianship by appointment of the High Court of Justice. The power of appointing and removing guardians vested, it is said, in the sovereign as *parens patriæ*, and delegated to the Chancellor, is exercised by the Chancery Division of the High Court of Justice (*g*).]

(*e*) *Ex parte Alicia Race*, 26 *Law Journal N. S., Q. B.*, 1857, p. 169; s.c. nom. *Reg.* v. *Clarke*, 7 *E. & B. Rep.* p. 186.

(*f*) See note (*d*) to last page.

[(*ff*) See *In re Agar Ellis*, *L. R.* 10 *Ch. D.* p. 49.]

[(*g*) *Stephen's Blackst. Comm.* Book iii. ch. iv. sect. 2. *Bacon's Abridgement*, tit. Guardian (*c*), vol. iv. p. 101. By 49 and 50 Vict. c. 27 power to remove and appoint guardians is specifically given to the higher Courts of the United Kingdom.

"In England and Ireland the High Court of Justice, in any division thereof, and in Scotland either division of the Court of

The jurisdiction of the High Court of Justice extends to the care of the person of the minor until he attains the age of twenty-one, so far as is necessary for his protection and education; and to the care of his property, for its due management and preservation, and proper application for his maintenance. It is upon the former ground principally, that is to say, for the due protection and education of the infant, that the Court interferes with the ordinary rights of parents, as guardians by nature, or for nurture, in regard to the custody and care of their children (*gg*).

DLIII. Thirdly, with respect to the power of the Guardian over the property of the Ward (*h*).

And here it is first to be observed that not only English lawyers, but all jurists, make a great distinction between the Guardian's power over *moveable* and over *immoveable* property in a foreign land.

With respect to *moveable* property, continental jurists are, for the most part, of opinion that, inasmuch as by intendment of law it is holden to be in the domicil of the owner, therefore the law of the domicil of the guardian, the legal representative of the owner, must govern *in every country* the rights and powers of the guardian over the moveable property of the ward (*hh*).

Session, may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed." Section 6.]

(*gg*) *Story on Eq. Jurisprudence*, ch. xxxiv. s. 1341, p. 527.

The Divorce Court has followed the decisions at Common Law.

By the "Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), s. 25, "in questions relating to the custody and education of infants the rules of Equity shall prevail."

[(*h*) The judgment in *Lamar* v. *Micou*, 7 *Davis's U. S. A. Rep.* p. 218, should be consulted.]

(*hh*) As to the authority of guardians to recover property of the infant out of the jurisdiction, see *Scott* v. *Bentley*, 1 *K. & J. Rep.* p. 281.

This is certainly the true language of international justice, and seems to be the Law of England. But the United States require that a fresh authority to act as guardian be conferred by their own tribunal (*forum gestæ administrationis*): "There are few decisions" (observes Story) "upon the subject, probably because the principle "has always been taken to be unquestionable (!), founded "upon the close analogy of foreign executors and ad- "ministrators" (*i*).

It is to be observed, however, that though this country differ from the rest of the civilized world (*k*) in holding a new authority to be requisite in the case of a foreigner in respect to moveable as well as immoveable property, there is no reason to suppose that such an authority would be denied to the person already clothed with the authority of guardian in his own country—the analogy, as will be seen, of the foreign executor or administrator leads to the opposite conclusion. The practice is justified by the allegation, that Comity may, in both instances, require you to clothe the foreign officer with the power necessary for the execution of his office in the foreign country, but that, in both instances, the State has a right to take care that its own subjects are not debarred from an opportunity of vindicating their claims upon the *property* in the country wherein it, moveable or immoveable, is situate (*l*).

(*i*) *Confl. of L.* s. 504 *a*. See s. 499 *a*; *Westlake*, ss. 4-8.

(*k*) "Vorzüglich schwankend ist die Praxis in den Ländern des Englischen Rechts, indem in diesen theilweise besondere Vormundschaften bestellt werden, nicht blos über das unbewegliche, sondern auch über das bewegliche auswärts liegende Vermögen."—*Savigny*, *R. R.* s. 380. [He cites *Story*, *Confl. of L.* s. 492 *et seq.*]

(*l*) It is clear, from the following extract, that *D'Aguesseau* classed *Guardianship* among *Real Statutes*, and probably authorises the doctrine of my text:—

"Ce qui caractérise véritablement un statut réel, et ce qui le distingue essentiellement du statut personnel, n'est pas qu'il soit relatif à certaines qualités personnelles, ou à certaines circonstances personnelles, ou à certains événemens personnels; autrement il faudroit dire que tous les statuts qui concernent *la puissance paternelle*, *le droit de*

DLIII.A. [*Morrison's case*—sometimes cited as an unreported case showing that an English committee may sue in Scotland for money there due to his lunatic—seems only to decide that the suit might proceed in the lunatic's name (*m*).]

DLIV. Fourthly, as to the power of Guardians over *immoveable* property.

Upon this point the English Law is in accordance with the greatly preponderating opinion of foreign jurists (*o*), in holding that the *lex rei sitæ* is to govern, and that the guardian must obtain the sanction of the local authority to intermeddle with or in any way administer or deal with the immoveable property of the ward.

Savigny (*p*) throws the weight of his great authority into the opposite scale. He denies that either with regard

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garde, le droit de viduité, la prohibition aux conjoints de s'avantager l'un et l'autre, sont autant de statuts personnels, et *cependant il n'est pas douteux dans notre jurisprudence, qu'on les considère tous comme des statuts réels, dont l'exécution se règle non par la loi du lieu du domicile, mais par celle du lieu où les biens sont situés.* Le véritable principe dans cette matière est qu'il faut distinguer si le statut a directement les biens pour objet, ou leur affectation à certaines personnes, et leur conservation dans les familles, en sorte que ce ne soit pas l'intérêt de la personne dont on examine les droits ou les dispositions, mais l'intérêt d'un autre dont il s'agit d'assurer la propriété ou les droits réels, qui ait donné lieu de faire la loi ; ou si au contraire toute l'attention de la loi s'est portée vers la personne, pour décider en général de son habilité ou de sa capacité générale et absolue, comme lorsqu'il s'agit des qualités de majeur ou de mineur, de père ou de fils légitime ou illégitime, d'habile ou inhabile à contracter pour des causes personnelles. Dans le premier cas le statut est réel ; dans le second, il est personnel ; c'est ce qui est assez bien expliqué dans ces mots de D'Argentré : 'Cum statutum non simpliciter inhabilitat, sed ratione fundi aut juris realis alterum respicientis extra personas contrahentes, toties hanc inhabilitationem non egredi locum statuti.'"—*D'Aguesseau*, tom. iv., cited in *Rocco*, lib. i. cap. ii. p. 26.

(*m*) [Reported as *Baynes* v. *Earl of Sutherland*, 1 *Paton's Scotch App. in H. of L.* p. 454. See 46 *L. J. N. S. Ch.* p. 789. See *Hunter* v. *Potts*, 4 *T. R.* at p. 185 ; *Sill* v. *Worswick*, 1 *H. Blackstone Rep.* at pp. 677 and 682.]

(*o*) Collected in *Story*, ss. 500 *et seq.*

(*p*) *R. R.* viii. s. 380, num. 1.

to principle or the general practice (meaning, it is presumed, of the German States), the *lex rei sitæ* ought to govern the power of the Guardian. He maintains that the law is not a *Real* but a *Personal Statute*; that the whole Guardianship is one authority governed by one Law, that of the domicil, and not parcelled out into as many laws as there are countries in which the property of the ward may be situate.

DLV. The Prussian Law [contained provisions] in accordance with the opinion of this distinguished jurist (*pp*). It is, indeed, admitted by Savigny that a great practical difficulty arises when the real property of the ward is scattered over different territories; the solution which he proposes, and which appears to have been adopted in Prussia, is that in these places ancillary or subordinate Curators or Guardians should be appointed under the general superintendence of the one Guardian constituted according to the Law of the Paternal domicil.

Such an arrangement is not altogether inconsistent with the principles of the Roman jurisprudence upon the same subject, which, when the property of the ward was scattered and the guardian was to be nominated, not by testament or by the written law, but by the living authority, appointed one for the *res Italicæ* and another for the *res Provinciales*.

DLVI. Prussia has entered into treaties with her immediate neighbours upon this subject to the effect that, generally speaking, the Law of the domicil of the ward shall govern the appointment of the guardian; but that it shall be competent to the foreign authority to elect between appointing a separate, and appointing an ancillary Guardian for the real property of the ward subject to its jurisdiction.

DLVII. This system of appointing ancillary or sub-

[(*pp*) That portion of the Prussian Code which dealt with the subject of Guardianship has now been modified to a very considerable extent by the *Vormundschafts-Ordnung* of July 5, 1875.]

sidiary guardians is, after all, very germane to the English and American practice respecting foreign administrations of *personal* property; and if the American Courts, as has been already suggested, follow the same rule respecting foreign guardians, the violation of Comity would be more in theory than in practice.

DLVIII. A case upon the conflict of the powers and rights of Guardians, decided by the Supreme Court of Berlin, is fit to be inserted in this place:—

A ward of good family lived in Bavaria under guardianship. He possessed property in a part of Rhenish Prussia, to which no ancillary guardian had been appointed. The Bavarian guardian [sold some property of his ward without putting it up to auction,] and not under the peculiar limitations and restrictions required by the French Code (*q*), which was the Law of Rhenish Prussia. The ward having attained his majority, reclaimed the property, on the ground that the sale was illegal. The claim seems to have been rejected on two grounds:

1. That these limitations and restrictions were parts of one indivisible system of laws respecting guardianship; and it was clear that other parts of this system were *ex necessitate rei* inapplicable to the Bavarian ward.

2. That under any view of the law these restrictions and limitations were, as a matter of fact, only applicable to those parts of that property which were without the Bavarian dominions (*r*).

DLIX. With respect to the *obligation* to undertake the office of Guardian, and the legitimate *excuses* for declining it, these must depend upon the Law of the domicil of the ward: they are unknown to the English Law. So must the amount of the guarantee or security required by

(*q*) *Dig.* lib. xxvi. t. vii. 39.
Ib. lib. xxvi. t. v. 27.
Code Civil, arts. 457–460.

(*r*) *Bassenheim* v. *Raffauf* (*Urtheil des Cassations-Hofes zu Berlin*, 1847), cited in *Savigny, R. R.* viii. s. 380, num. 2.

the State for the due execution of the office, *e.g.* whether that security shall be given upon property *dehors* the jurisdiction which imposes it (*s*).

DLX. The question relating to the guardian's power of changing the domicil of his ward has been already discussed (*t*).

DLXI. There seems to be no reason why a different rule of practice should govern the case of the Guardian, or Committee, according to the phraseology of English Law, of the *Lunatic*.

The case of a conflict of laws upon this subject, from its very nature, but rarely occurs. Such a one did, however, take place some time ago in Paris. Mr. Dyce Sombre, who had been placed under the care of committees or keepers by the Lord Chancellor of England, to whom the constitution of this country confides the care of lunatics, escaped to Paris, and, declaring himself to be sane, invoked the aid of the authorities there. He was claimed by the agent of the committee appointed by the English Lord Chancellor; but the French authorities refused to give him up, tried the case over again at Paris, causing him to be inspected by French physicians, and, on their verdict of his sanity, allowed him to live in France without restraint. The English Court, of course, retained possession of his property. It is certainly difficult to defend this proceeding at Paris upon the principles of International Comity (*tt*).

DLXII. In some countries, in accordance with the provisions of Roman Jurisprudence, a guardian is assigned to the Prodigal; the appointment of such a guardian ought to be respected in other countries, though such an appointment might not be holden to affect the capacity of the Prodigal ward to deal with *immoveable* property situate

(*s*) *Rocco*, lib. ii. cap. xxvii. pp. 241-243.
Savigny, *R. R.* viii. s. 380, num. 3.
(*t*) *Suprà*, chap. ix.
[(*tt*) See 10 *Moore's P. C. Rep.* p. 236.]

in a country to whose jurisprudence such a guardianship was unknown.

The French Courts refused, in 1836, to give effect in France to the decrees (*u*) of the native tribunal which had placed the estates of the Duke of Brunswick under a curatorship, upon the double ground that, as far as the *law* was concerned, the sentence was not supported by the proofs of *private* prodigality required by French Law, and could not be applied to French property; and as far as *public* and *political* considerations were concerned, they were inapplicable to property without the jurisdiction of the native Court (*x*).

DLXIII. The principle and practice of the English Law receive illustration from the judgment delivered in the matter of *John Houston*.

This was a case of a petition for a commission in the nature of a writ *de lunatico inquirendo*, by an illegitimate sister of the supposed lunatic, and her husband.

The insanity of the individual was not denied; but it

(*u*) Cf. liv. i. titre xi. c. ii. arts. 489–492 of the French Code. The title is "*De l'Interdiction*," which Rogron explains thus: "L'Interdiction est l'état d'un individu déclaré incapable des actes de la vie civile, et privé par suite de l'administration de sa personne et de ses biens."—*Rogron, Code Napoléon expliqué*, ad loc. cit.: "Le majeur qui est dans *un état habituel d'imbécillité, de démence* ou *de fureur*, doit être interdit même lorsque cet état présente des *intervalles lucides*." It appears that *le majeur* includes *le mineur*.—*Rogron*, Art. 489. *Sirey*, ad loc. cit.: "Toute demande en interdiction sera portée devant *le tribunal* de première instance." "*Le tribunal*" Rogron explains as that "du domicile de la personne dont on provoque l'interdiction."—Art. 492.

(*x*) *Pütter, Fremdenrecht*, Theil ii. Kap. iii. § 63.

Fœlix, Mémoire relatif aux débats élevés devant les tribunaux au sujet de l'interdiction de S. A. le Duc Charles de Brunswick, 1838.

Fœlix, Droit. Int. Pr. ss. 33, 89.

In the last section he says: "L'individu *interdit* dans son pays, et par là rendu incapable, l'est aussi en pays étranger;" citing

Boullenois, tit. i. c. ii. obs. 4, pp. 51, 59, 174;

Denisart, v. "Prescription," num. 9.

Rocco, lib. iii. cap. xxi. p. 436; and other authorities.

was stated as an answer to the application, that a commission of lunacy had issued, and was now in force against him in Jamaica, where his property was situated, and where till lately he had resided; that three persons had been appointed his Committees in that island; that he had been brought over to this country for the sake of his health; that Clarke, one of his Committees, had accompanied him, in order to take care of his welfare and comfort; that, in these circumstances, a commission in England was not necessary for the protection of the lunatic and his property, and therefore ought not to be granted.

The Lord Chancellor: "The commission now existing "in Jamaica is no reason why a commission should not "issue here. On the contrary, it is evidence of the abso-"lute necessity that there should be somebody authorized "to deal with the person and estate of this lunatic. "While the lunatic is here, no Court will have any "authority over him or his property, unless a commission "is taken out" (*y*).

DLXIII.A. With respect to the practice in Equity as to the recognition of the title of the foreign *curator bonis* to property under the jurisdiction of the English Court, the following cases are deserving of notice, the latter perhaps appearing to be a little at variance with the former decision; but, on the other hand, it is to be borne in mind that the Court seems to consider each individual case as one of discretion.

The lunatic (*z*) in the first case was resident in Holland, and was possessed of considerable sums of Bank stock and East India stock in this country. The curator, appointed according to the Law of Holland, presented a petition for

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(*y*) *Re Houston*, 1 *Russell's Rep.* p. 312.

(*z*) *Re Elias*, 3 *Macnaghten & Gordon's Rep.* p. 234. See also *Newton* v. *Manning*, 1 *ibid.* p. 362 (1849); and *Scott* v. *Bentley*, 1 *Kay & Johnson*, p. 281 [corrected at p. 789 of 46 *L. J. N. S. Ch.*].

payment out to him of the *corpus* of these sums in the following circumstances.

The late Lord Chancellor Cottenham had made an order authorizing the present petitioner to receive the dividends of the stocks, and referring it to the Master to ascertain whether the petitioner was, according to the law of the kingdom of the Netherlands, entitled to have the funds transferred to him. No inquiry was directed as to whether the petitioner had given any security, and it did not appear whether the lunatic was a native of Holland.

The Master had made a report, finding that the lunatic had been duly declared such according to the law of the kingdom of the Netherlands, and that the petitioner was, according to such law, duly appointed curator, and, as such, entitled to have the funds transferred to him.

Lord Chancellor Truro, after some hesitation, made the order in the terms of the prayer of the petition, observing that he assumed that no security had been given by the curator, and that none was required by the laws of Holland. His lordship intimated that he should have had no difficulty in making the order if it had been shown that the lunatic was a Dutch subject.

In the second case, an Englishman (*a*), while resident in France, was found a lunatic by the laws of that country, and a *curator bonis* was appointed by the French Court. A fund in this country to which the lunatic became entitled was paid into Court under the Trustee Relief Act. It was holden, upon petition by the *curator bonis* for payment of the fund to him as a matter of right, that the Court could exercise a discretion; and, it appearing that the lunatic was sufficiently provided for from other sources, an order was made for retaining the *corpus* of the fund in Court, and the payment of the dividends only to the curator (*b*).

(*a*) *Re Garnier*, *L. R.* 13 *Eq.* p. 532.

[(*b*) In *Grimwood* v. *Bartels* (46 *L. J. N. S. Ch.* p. 788), Vice-

DLXIV. Here ends the consideration of the effect of Foreign Law upon the Rights and Duties incident to the Relations of *Family* (*c*).

Chancellor Hall refused to transfer out of Court proceeds of sale of real estate in England to the *curator ad bona*, appointed under Chilian law, of Juan D. Grimwood, who had been born and was resident in Chili, and had been there found a lunatic.]

(*c*) *Vide antè*, § XXX.

CHAPTER XXVI.

RIGHTS RELATING TO PROPERTY.

DLXV. It was stated in the early part of this volume (*a*) that the Third Division of it would be occupied with the Jural Relations arising from Property; and that under this head would be included—

1. Rights to specific things:
   a. Immoveables.
   β. Moveables.
2. Rights to compel certain persons to do certain things, or Obligations, of which Contracts are a branch.
3. Rights relating to Succession, whether *Testamento* or *ab Intestato*.

DLXVI. We are now about to consider Rights to Specific Things, both Immoveable and Moveable.

In other words, the jurisprudence of Private International Law relating to the *acquisition* and *alienation* of property by foreigners now presents itself for our consideration.

So much, however, of the doctrine of that branch of jurisprudence depends upon or is affected by the distinction between *Moveable* and *Immoveable Property* (*b*), that on that account alone a clear understanding of the meaning of these terms is indispensable to the jurist. But with respect to the English jurist, there is another very important reason—viz. that the terms *immobilia* and *mobilia*

(*a*) *Vide suprà*, § xxxi.
(*b*) As to Bankruptcy, *vide post*, chap. xxxix. § dcclxxv.

cannot be considered by English lawyers as identical with "*realty*" and "*personalty*" in the English Law. The terms *mobilia* and *persona* are sometimes carelessly applied as identical with *personalty* and *person*. But *mobilia* in Foreign Law is not identical with *personalty* in English Law, and *persona* in Foreign Law means a person clothed with certain indelible attributes, and is very different from the naked word "person" in English Law.

DLXVII. According to the English Law, the subjects of property are divided into things real and things personal.

Personal things—with which we are alone now immediately concerned—are chattels. Chattels are subdivided into

1. Chattels Real;
2. Chattels Personal;

But both are personal property, or personal estate.

DLXVIII. Chattels Real are those estates which are less than freehold—that is, less than an estate of inheritance or for life in lands or tenements of free tenure, Chattels real, therefore, comprise (*c*)—(1) estates for years, that is, for *any fixed* or determinate time—*e.g.* for a thousand years (*d*).

This peculiarity of English Law arose out of two facts—namely,

1st, That, in feudal times, estates for years were very precarious, and subject to be defeated in various ways.

2ndly, That (at first) they were usually for very short periods.

(*c*) *Stephen's Blackstone*, vol. i. c. v. *Of Estates less than Freehold.* *Ibid.* vol. ii. pt. ii. *Of Things Personal.*

See *Sir Edward Vaughan Williams on Executors and Administrators* (vol. i. book iv. chap. i. § i.), as to what were *bona notabilia* under the former testamentary law of England.

[(*d*) A term of not less, as originally created, than 300 years, and having at least 200 years unexpired, may now under certain conditions be enlarged, by means of a deed, into a fee simple. 44 & 45 Vic. c. 41, s. 65.]

Chattels Real included also

(2) Estates at Will.

(3) Estates by Sufferance.

DLXIX. Chattels Personal may be subdivided into, (1) Corporeal; and (2) Incorporeal.

1. Corporeal are all moveable things, *e.g.* animals, money, goods.

2. Incorporeal are *Patent Rights*, *e.g.* exclusive rights of [making, using, and selling some new contrivance or invention]; *Copyright*, the exclusive right of [multiplying copies of an original composition, or work, in literature, music, or art]—a chattel which has become of late years a great favourite of International Law. [To these may be added *Trade marks* (*e*).]

Among incorporeal chattels are to be reckoned also chattels which are not in *possession*, but in *action*; that is, where a man has not the enjoyment, actual or constructive, of a thing, but a right to recover it by a suit at law, which the English Law calls a *chose in action*, *e.g.* debts, money due on a bond, a right to damages for non-performance of an agreement—things that are *in potentiâ*, not *in esse*.

DLXX. The Roman Law more than once refers to and recognizes a distinction between two classes of moveables —namely,

1. Those destined to remain constantly fixed at a certain place; and

2. Those in their nature of unfixed character, and only temporarily or accidentally deposited at a particular place.

In treating "De hæredibus instituendis," Ulpian (*ee*) remarks, "Rerum autem Italicarum vel Provincialium "significatione quæ res accipiendæ sint, videndum est. "Et facit quidem totum voluntas defuncti: nam quid "senserit spectandum est: veruntamen hoc intelligendum "erit, *rerum Italicarum* significatione eas contineri, quas

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[(*e*) *Vide infrà*, § dlxxiv.]

(*ee*) *Dig.* lib. xxviii. t. v. 35, §§ 3–5.

" perpetuò quis ibi habuerit, atque ita disposuit ut perpetuò " haberet. Ceteroquin si tempore in quo transtulit in " alium locum, non ut ibi haberet, sed ut denuo ad pristinum " locum revocaret, neque augebit quò transtulit, neque " minuet unde transtulit. Utputa de Italico patrimonio " quosdam servos miserat in provinciam, forte Galliam, ad " exigendum debitum vel ad merces comparandas, re- " cursuros si comparassent: dubium non est, quin debeat " dici ad Italicum patrimonium eos pertinere debere; . . " . . Quæ res in proposito quoque suggerit ut Italicarum " rerum esse credantur hæ res, quas in Italiâ esse testator " voluit.

" Proinde et si pecuniam miserit in provinciam ad " merces comparandas, et necdum comparatæ sint; dico, " pecuniam, quæ idcirco missa est, ut per eam merces in " Italiam adveherentur, Italico patrimonio adjungendam: " nam et si dedisset in provinciâ de pecuniis quas in Italiâ " exercebat ituras et redituras, dicendum est, hanc quoque " Italici patrimonii esse rationem. Igitur efficere dici, ut " merces quoque istæ, quæ comparatæ sunt, ut Romam " veherentur, sive provectæ sunt eo vivo, sive nondum, et " sive scit, sive ignoravit, ad eum heredem pertineant, cui " Italicæ res sint adscriptæ."

So, again, in treating " de actionibus empti et venditi," Ulpian says—

" Fundi nihil est, nisi quod terrâ se tenet. Ædium " autem multa esse, quæ ædibus affixa non sunt, ignorari " non oportet, utputa seras, claves, claustra; multa etiam " defossa esse, neque tamen fundi aut villæ haberi, utputa " vasa, vinaria, torcularia; quoniam hæc instrumenti magis " sunt, etiamsi ædificio cohærent. Sed et vinum, et fructus " perceptos villæ non esse constat " (*f*).

Scævola, in the book " De pignoribus et hypothecis," observes—

" Debitor pactus est, ut quæcunque in prædia pignori

(*f*) *Dig.* lib. xix. t. i. 17.

"data, inducta, invecta, importata, ibi nata paratave essent, "pignori essent. Eorum prædiorum pars sine colonis fuit, "eaque actori suo colenda debitor ita tradidit, assignatis "et servis culturæ necessariis: Quæritur, an et Stichus "villicus, et cæteri servi ad culturam missi, et Stichi vicarii "obligati essent? Respondit, eos duntaxat, qui hoc animo "a domino inducti essent, *ut ibi perpetuò essent, non temporis "causâ* accommodarentur, obligatos" (*g*).

DLXXI. Scotland, in this as in other respects, resembles both as to phraseology and in fact the law of foreign countries more than England. Property in Scotland is divided into *heritable* and *moveable*. "Moveables are, or "rather were, assigned by marriage and became common "between the spouses; they fall to the executor in succession; they remain with the seller of land or of houses; "they are removeable by a tenant on leaving his farm; "they are attached by arrestment and carried by poinding; "and in bankruptcy and succession they are regulated by "the law of the owner's domicil. Things which are deemed "heritable go by succession to the heir; they are not "assigned by marriage; they go with land to the buyer; "they remain for the landlord at the end of a lease; they "are affected by inhibition, and attached and carried by "adjudication; and they are regulated by the territorial "law, not by that of the owner's domicil. The character "of any subject or fund as, in these important respects, "heritable or moveable, may be either—1. By its Nature, "as being immoveable, like lands or houses; or as moveable, like furniture or cattle: or 2. By Connection, or "Accession to some subject which has by nature the "character of moveable or immoveable: or 3. By Destination of the owner, either as in connection with something "else, or in regard to succession" (*h*).

(*g*) *Dig.* lib. xx. t. i. 32.

(*h*) *Bell's Principles of the Law of Scotland* (8th edit. by W. Guthrie, A.D. 1885), vol. ii. p. 125 (bk. ii. chap. x. s. 1470).

DLXXII. Under the French term *biens*, as under the Latin term *bona*, all property was comprised.

" *Biens.*—Nous entendons ici par ce mot tout ce qui peut " composer les richesses et la fortune de quelqu'un (*i*).

" I. *Biens meubles.*

" Ce sont ceux qui peuvent se mouvoir ou être transportés " d'un lieu à un autre, lorsqu'ils ne sont point destinés à " faire perpétuellement partie d'un fonds, d'un héritage ou " d'un bâtiment. Ainsi, les meubles meublans d'un hôtel, " les animaux domestiques, l'or, l'argent, en un mot, tout ce " qui peut se déplacer sans être détérioré, et sans donner es- " sentiellement atteinte au fonds dont il dépend, est dans la " classe des choses mobilières, sans considérer si l'objet est " d'un grand ou d'un petit volume : et c'est à raison de sa " mobilité qu'on lui donne le nom de *meuble* (*j*).

" *Meubles incorporels.*—Les biens de cette espèce sont les " droits qui tendent à nous procurer des objets mobiliers en " vertu de contrats, de promesses ou d'obligations ; les actions " auxquelles ces droits donnent lieu, sont aussi de la même " nature, suivant la maxime, *omnis actio ad consequendum* " *mobile, est mobilis.* (Code Civil, art. 529.) " (*k*)

" II. *Biens immeubles.*

" Ces sortes de biens sont de deux espèces ; les uns sont " *corporels*, comme nous l'avons dit des meubles, et les autres " *incorporels.*

" Les immeubles corporels sont les fonds de terres, comme " prés, vignes, étangs, bois, édifices, &c. Tout ce qui en dé- " pend essentiellement, comme les fruits pendans par racines, " les arbres, les clôtures, est de la même qualité ; en un " mot, tout ce qui n'est point susceptible de mobilité, et qui " n'entre point dans la classe des choses mobilières dont nous " venons de parler, est immeuble.

" Les immeubles incorporels sont ceux dont l'immobilité

(*i*) *Merlin, Rép.* Biens (tome ii. p. 114, edit. 1825).
(*j*) *Merlin, Rép.* Biens, I. s. i.
(*k*) *Ibid.* s. 13.

" n'est pas sensible, et qui, par cette raison, demandent un " certain détail (*l*).

" Les actions qui tendent à nous procurer un immeuble, " sont de la même qualité que cet immeuble (*m*).

" Aujourd'hui, les rentes perpétuelles et viagères sont " réputées meubles dans toute la France. Code Civil, art. " 529 (*n*).

" Les immeubles corporels ne suivent d'autre loi que " celle du lieu où ils sont situés " (*o*).

[DLXXII.A. The distinction between *moveable* and *immoveable* property, laid down by the Civil Code of France (*p*), finds its place also in the codes of other European nations.

(*l*) *Merlin, Rép.* Biens, II. s. 1.

(*m*) *Ibid.* s. 2.

(*n*) *Ibid.* s. 2.

(*o*) *Ibid.* s. 2.

[(*p*) *Code Civil*, liv. i. tit. i. De la distinction des biens.

Art. 516. "Tous les biens sont meubles ou immeubles."

Art. 517. "Les biens sont immeubles, ou par leur nature, ou par leur destination, ou par l'objet auquel ils s'appliquent."

Art. 518. "Les fonds de terre et les bâtiments sont immeubles par leur nature."

. . . . . .

Art. 524. "Les objets que le propriétaire d'un fonds y a placés pour le service et l'exploitation de ce fonds, sont immeubles par destination. Ainsi sont immeubles par destination quand ils ont été placés par le propriétaire pour le service et l'exploitation du fonds,—Les animaux attachés à la culture ;—Les ustensiles aratoires ; " . . . .

. . . . . .

Art. 526. "Sont immeubles, par l'objet auquel ils s'appliquent,—L'usufruit des choses immobilières ;—Les servitudes ou service fonciers ;—Les actions qui tendent à revendiquer un immeuble."

Art. 527. "Les biens sont meubles par leur nature, ou par la détermination de la loi."

Art. 528. "Sont meubles par leur nature, les corps qui peuvent se transporter d'un lieu à un autre, soit qu'ils se meuvent par eux-mêmes, comme les animaux, soit qu'ils ne puissent changer de place que par l'effet d'une force étrangère, comme les choses inanimées."

Art. 529. "Sont meubles par la détermination de la loi, les obligations et actions qui ont pour objets des sommes exigibles ou des effets mobiliers, les actions ou intérêts dans les compagnies de finance,

In the Prussian Code, Things (*Sachen*—a word in its widest legal sense corresponding closely to *biens*) are deemed moveable (*beweglich*) or immoveable (*unbeweglich*) according to whether or not they can be brought from one place to another without injury to their essential parts or qualities (*Substanz*) (*q*).

The Italian Code resembles the French (*r*).

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de commerce, ou d'industrie, encore que des immeubles dépendants de ces entreprises appartiennent aux compagnies. . . . Sont aussi meubles par la détermination de la loi, les rentes perpétuelles ou viagères, soit sur l'Etat, soit sur des particuliers."

Arts. 533-535 define the words "*meubles*," "*meubles meublants*," "*biens meubles*," "*mobilier*," "*d'effets mobiliers.*"]

[(*q*) *Allgem. Landrecht für die Preuss. Staaten*, Theil i. Tit. ii. Von Sachen und deren Rechten überhaupt.

Art. 1. "Sache überhaupt heisst im Sinne des Gesetzes alles, was der Gegenstand eines Rechts oder einer Verbindlichkeit sein kann."

Art. 2. "Auch die Handlungen der Menschen, ingleichen ihre Rechte, in so fern dieselben den Gegenstand eines andern Rechtes ausmachen, sind unter der allgemeinen Benennung von Sachen begriffen."

. . . . . .

Art. 4. "Alle Theile und Eigenschaften einer Sache, ohne welche dieselbe nicht das sein kann, was sie vorstellen soll, oder wozu sie bestimmt ist, gehören zur Substanz."

Art. 5. "So lange also durch die Aenderung oder Verwechselung einzelner Theile die Sache weder vernichtet, noch die Hauptbestimmung derselben geändert worden ist, so lange ist noch keine Veränderung in der Substanz vorgefallen.'

Art. 6. "Je nachdem eine Sache, ihrer Substanz unbeschadet, von einer Stelle zur andern gebracht werden kann, oder nicht, wird sie für beweglich oder unbeweglich angesehen."

Art. 7. "Rechte werden als bewegliche Sachen betrachtet."

Art. 8. "Wenn aber die Befugniss zur Ausübung eines Rechts mit dem Besitze einer unbeweglichen Sache verbunden ist, so ist das Recht selbst als eine unbewegliche Sache anzusehen."

Art. 9. "Ausserdem hat ein Recht die Eigenschaft einer unbeweglichen Sache nur alsdann, wenn ihm dieselbe durch besondere Gesetze ausdrücklich beigelegt worden."

Subsequent articles define "Mobiliarvermögen," "baares Vermögen," "Effekten," and other expressions.]

[(*r*) *Codice Civile*, lib. ii. titolo i. Della distinzione dei beni.

The Dutch Code also in some respects follows the French. It divides Things (*Zaken*) into corporeal and incorporeal, and into moveable and immoveable; things moveable are subdivided into Consumable (*verbruikbaar*) and Inconsumable (*onverbruikbaar*) (*s*).

It will be seen that the category of *real estate* according to English Law is much less comprehensive than that of *immoveable property* in Continental codes; especially in the French Code and others that follow it, which give not only to what are known as "fixtures," but even to animals devoted to agriculture, the legal character of immoveableness.]

Art. 406. "Tutte le cose che possono formare oggetto di proprietà pubblica o privata, sono beni immobili o mobili."

Art. 407. "I beni sono immobili o per natura o per destinazione, o per l' oggetto a cui si riferiscono."

. . . . . .

Art. 416. "I beni sono mobili per loro natura o per determinazione della legge."

The provisions on this subject differ but little from those of the French Code.]

[(*s*) *Burgerlijk Wetboek*, Boek II. Titel i. Van de zaken en derzelver onderscheiding.

Art. 555. "De wet verstaat door zaken alle goederen en regten welke het voorwerp van eigendom kunnen zijn."

. . . . . .

Art. 559. "Zaken zijn *ligchamelijk* of *onligchamelijk*.

Art. 560. "Zaken zijn *roerend* of *onroerend*, volgens de bepalingen der twee volgende afdeelingen."

Art. 561. "Roerende zaken zijn *verbruikbaar* of *onverbruikbaar*; verbruikbaar zijn de zoodanige die door gebruik verloren gaan."

Arts. 562-564 enumerate things that are *onroerende* by nature or by destination. The list comprises land, buildings, mills, trees, &c.; domestic, agricultural, and trade fixtures; and generally all such objects as the owner by continuous use has connected with his immoveable property. Tithes, ground-rents, with certain rights relating to, and actions for recovering, immoveable property, are also included.

Art. 565. "Roerende zaken uit haren aard zijn de zoodanige die zich zelve kunnen verplaatsen, of die verplaatst kunnen worden." Fixed periodical payments, whether perpetual or for life, and shares in companies, are moveable.]

DLXXIII. Pressed by the manifest absurdity of applying the doctrine *mobilia sequuntur personam* to the foreign possessor of English personal property, Story endeavours to escape from it by saying, "When, however, we speak of "*moveables* as following the person of the owner, and as "governed by the law of his domicil, we are to limit the "doctrine to the cases in which they may properly be said to "retain their original and natural character" (*t*); and again—"Here, as we have already seen (*u*), not only "lands and houses, but servitudes and easements, and "other charges on lands, as mortgages and rents, and trust "estates, are deemed to be, in the sense of law, immove-"ables, and governed by the *lex rei sitæ*" (*v*).

But of what Law is Story here speaking, as causing chattels real, such as rents, which are treated as personal property by English Law, to be governed by the law of the *situs*? And what Law does Story rely upon for his statement, that only such moveables as retain their original and natural character follow the person? Not the Law of England or of his own country (which in an *international* treatise he persists in calling the *common law*), but the Law to be derived from the reasoning of jurists, to whom he refers in a note; for at that time no decision of an English or American Court could be cited in support of his opinion (*w*).

(*t*) *Conflict of Laws*, s. 382.

[(*u*) *Ibid.* s. 382.]

(*v*) *Ibid.* s. 447.

[(*w*) "The statement that personal estate is governed by the law of its owner's domicil must be taken with material qualifications." See judgment of the Judicial Committee of the Privy Council in *Blackwood* v. *The Queen*, *L. R.* 8 *App. Ca.* at p. 92. This was a case relating to probate duty.]

CHAPTER XXVII.

JURA INCORPORALIA.

DLXXIV. We have considered the nature of Moveable and Immoveable Property, of *jura in re*; there remains a class of property which jurists make a third class, *jura ad rem*, that is, *incorporeal rights*, "quæ bona "neque dicuntur *mobilia*, neque *immobilia*, sed *tertiam* spe- "ciem bonorum componunt et dicuntur *incorporalia*" (*a*).

These are considered subjects of property. They are perhaps more strictly the means of obtaining property (*b*); such are rights of action, and of succession (*jus hæreditatis*); and debts, which are holden by the better authorities to be attached to the person of the creditor (*c*).

These incorporeal chattels form part of what is happily termed, in the Roman Law, the *universitas juris* of the successor to a deceased person, or of the assignees of a bankrupt.

Thus Donellus says, "Hæreditas enim res est incorporalis "in jure consistens; et quamvis in hæreditate contineantur "res corporales, ipsum tamen jus hæreditatis incorporale est. "Quæ incorporalia" (he adds) "nusquam sunt;" and having no place, he shows that the *lex rei sitæ*, which he generally adopts, as has been said, cannot govern in their

(*a*) *Casaregis, In Rubr. Stat. Civ. Genuæ de Success. ab Intestat.* n. 64, 65, tome iv. pp. 42, 43, cited by Story, *Conflict of Laws*, s. 399, note from *Livermore's Dissertations*, p. 162, § 251.

(*b*) I am not speaking of *servitudes*, or the *jus emphyteuseos*, which are of the nature of immoveable property. It is perhaps difficult correctly to classify mortgages.—See *Story*, s. 435 and s. 523.

(*c*) *Story*, s. 399.

case, but that "relinquitur omnino locus is unus, in quo "controversia hæreditatis tractanda sit, ubi scilicet, qui "convenitur, habet domicilium" (*d*).

This subject is further treated of hereafter in the consideration of Obligations, and of Succession *testamento* or *ab intestato*.

There are three classes of *incorporeal chattels* which have obtained particular consideration in the Law of England (*dd*).

1. *Patent Rights.*
2. *Copyrights.*
3. *Trade Marks.*

Copyright has, as will be seen, been clothed with an International character. All three are regulated by Statute Law.

DLXXV. 1. The grant of a Patent Right (*e*) is an act of Royal or executive power, not *ex debito justitiæ*. A Patent Right is assignable by a writing under hand and seal; it is also competent to the patentee, without an entire alienation of his interest, to grant deeds of license to any one or more persons to manufacture the article (*f*).

No decision has been given in England upon the subject of the foreigner's capacity to be an assignee of such a right; but there seems no reason to doubt that he, or at least an *alien ami*, has such a capacity.

DLXXVI. It is clear, however, that according to the general principles of International Law (*g*), such Patent

(*d*) *De Jure Civ.* lib. xvii. c. xvii. 12, et cf. lib. xix. c. i. 4. "Si actiones interpretamur jura persequendi, dicimus actiones quæ sint res incorporales."

Cf. *Story, Conflict of Laws*, chap. xii.

(*dd*) *Stephen's Comment.* vol. ii. bk. ii. pt. ii. ch. iii. Of title by Invention.

(*e*) As to patent rights, see

[21 Jac. I. c. 3, s. 6; 46 & 47 Vic. c. 57, of which act the 103rd and 104th sections deal with International and Colonial arrangements; 48 & 49 Vic. c. 63; and 49 & 50 Vic. c. 37.]

(*f*) *Stephen, ubi sup.*

(*g*) *Foelix*, liv. ii. t. ix. c. vi. s. 607. *Massé, Le Droit Commerc.* liv. iv.

Rights (*brevets d'invention*) do not extend beyond the territorial limits of the sovereign who grants them, and are not recognized by foreign States.

DLXXVII. In France two questions—one directly, the other indirectly, relating to these subjects—have undergone judicial examination.

i. Is it lawful for a Frenchman to make or counterfeit the subjects of a patent granted by a Foreign State?

To this question the answer has been without hesitation in the affirmative. Such patents are considered exclusively as creatures of the municipal law of each State. "We have "not yet advanced" (says Fœlix (*h*), with evident regret) "to the stage which would apply to them the principle of "the *comitas gentium*."

The second question is—

ii. Is it lawful for a Frenchman to stamp upon his own merchandise the stamp or mark of a *foreign* manufacturer?

It is melancholy to record that the *Cour de Cassation* (*i*) has decided this question in the affirmative. "It is" (Fœlix says) (*k*) "one more misfortune to add to those which a "narrow-minded legislation and jurisprudence have already "drawn down upon France, by provoking measures of "*rétorsion* in Foreign States" (*l*).

There is something ludicrous in the attempt of the *Cour*

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tit. ii. ch. ii. De la Propriété littéraire, artistique et industrielle. The general question and theory of such property is very lucidly discussed.

M. Renouard, des brevets d'invention. Code international de la propriété industrielle, artistique et littéraire, par *M.M. Pataille et Huguet* (Paris, 1855).

(*h*) *Ubi sup.* [See *Loi du* 5 *Juillet* 1844, art. 29.]

(*i*) See decision of 12th July, 1848 (*Dev.-Car.* 48, 1, 417), cited in *Demangeat's* note to *Fœlix*, *ubi sup.* [But see now the case of *Affaire Rowland & Sons*, cited *infrà*, § dlxxx.c. note (*b*).]

(*k*) *Ubi sup.*

(*l*) [But see now the International Convention for the Protection of Industrial Property, signed at Paris March 20, 1883; *infrà*, § dlxxx.f, and Appendix III.]

de Paris (*m*) to atone, as it were, for this injustice by deciding that a foreigner cannot be *criminally* proceeded against in France for fraudulently using the stamp of a French manufacturer in a Foreign State. Demangeat, moreover, thinks that he would be liable to civil damages.

The Judicial Committee of the Privy Council have holden, in the case of an English patentee obtaining a patent abroad for his invention in addition to his English patent, that the English patentee is in no sense to be thereby prejudiced either with respect to his original patent, or with respect to any application which he may be advised to make for a renewal of it.

And, also, that an English patentee who has obtained a patent from abroad, may make out a case for a prolongation of his patent, but that regard must be had to all the circumstances of the case; to the antecedent circumstances, the effect of which the Legislature itself has thought of so much importance as to make it absolutely impossible for the Crown in some cases to grant a renewal of a patent, or even to extend a patent beyond the duration of the foreign patent, whether the invention is in its origin and domicil a foreign invention or an English invention; and that difference must be borne in mind in considering such an application (*n*).

DLXXVIII. 2. Copyright is the exclusive right which the law allows an author, [or his assigns, of multiplying copies of] his own original work (*nn*).

It is a right of which no traces are to be found in the Roman Law. In England it was of a most uncertain charac-

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(*m*) 19th and 29th November, 1850, *Dev.-Car.* 52, 2, 345, *Demangeat's* note to *Fœlix*, *ubi sup.* [note (*a*) to tome ii. p. 321].

(*n*) *In re Johnson's Patent* (*Willcox & Gibbs*), *L. R.* 4 *P. C.* at p. 80. See also *In re Winan's Patent*, *ib.* p. 93; *in re Blake's Patent*, *ib.* p. 535. [*Holste* v. *Robertson*, *L. R.* 4 *Ch. D.* p. 9. As to Extension of the term of a Patent, see 46 & 47 Vic. c. 57, s. 25. As to Foreign Patent, see *Soc. Anon. des Manufactures des Glaces* v. *Tilghman's Patent Sand Blast Co.*, *L. R.* 25 *Ch. D.* p. 1.]

[(*nn*) *Vide suprà*, § dlxix

ter till the reign of Queen Anne (*o*), when it became the subject of Statute Law (*p*), from which it has received considerable protection and favour (*pp*).

DLXXIX. But all States were [at one time] unanimous in their opinion that they were under no obligation to recognize the exclusive right of this intellectual property of foreigners within their territories. The arguments, bad and good, are well known upon this subject. At the same time the German Confederation (*q*) seized the oppor-

(*o*) 8 Anne, c. 21, [now repealed by 5 & 6 Vic. c. 45.]

(*p*) See also 15 Geo. III. c. 53 [as to copyrights held by the English and Scottish Universities, and the Colleges of Eton, Westminster, and Winchester; and several subsequent Acts, down to 49 & 50 Vic. c. 33, "The International Copyright Act, 1886." *Vide infrà*, § dlxxix. A.]

[(*pp*) Cf. the Italian Civil Code.

Art. 437. "Le produzioni dell' ingegno appartengono ai loro autori secondo le norme stabilite da leggi speciali."]

(*q*) "Nous devons dire un mot de la disposition relative à la *contrefaction*. Il n'y a pas de pays où cette espèce d'industrie soit poussée plus loin qu'en Allemagne. Le partage de ce pays en plusieurs souverainetés la favorise, et elle trouve de la protection dans les principes de gouvernement de quelques états. La monarchie Autrichienne, le royaume de Wurtemberg et le grand-duché de Bade sont les principaux foyers de cette espèce de brigandage littéraire, qui est la principale cause de la cherté des livres en Allemagne. La contrefaction est illicite, dans chaque état, à l'égard des auteurs ou éditeurs sujets du même état; mais la réimpression d'ouvrages imprimés dans un pays étranger n'a jamais été regardée comme contrefaction; c'est un droit que les Allemands, les Français, les Suisses, les Anglais et les Hollandais ont de tout temps librement exercé les uns envers les autres. Ce principe, vrai dans sa généralité, entraîne de graves inconvénients dans une nation partagée, comme la nation Allemande, en un grand nombre de souverainetés, si, au lieu de se regarder comme parties du même tout, chacune de ces souverainetés veut jouir des droits d'un état particulier. Telle a cependant été, et est encore dans ce moment, la prétention de quelques souverains Allemands, de manière que les ouvrages publiés dans les états des rois de Prusse et de Saxe peuvent être contrefaits dans le grand-duché de Bade. On a vu en Allemagne un autre abus d'un principe juste par lui-même: il y est arrivé que des ouvrages originaux, publiés dans une partie de l'Allemagne, ayant été contrefaits dans une autre, les éditions illégitimes, qui avaient paru sous la protection des lois de ce dernier pays, se trouvèrent favorisées au dé-

tunity of the Congress of Vienna to propose that copyright should be as much respected throughout the different States which composed the confederation, as through the different provinces of a single State.

The reasoning was applicable to the whole civilized world, the different States of which ought, in all matters of Comity, to consider themselves as members of one family; and the great States of Europe [began gradually to take measures for incorporating] by treaty the doctrine of International Copyright into the system of International Law.

Thus the German Diet introduced a convention upon this subject between the different members of the Confederation in 1837. Austria and Prussia gave in their adherence on behalf of those portions of their territories which did not belong to the Confederation. Austria and Sardinia had a convention in 1840, to which the other States of Italy, and one of the Swiss Cantons, adhered.

In 1837, Prussia passed a law of reciprocity in this matter with all Foreign States. In 1838 the English Parliament passed a yet more liberal statute [(*qq*); and further legislation ensued.] At first France held back, but in 1852 she promulgated a decree subjecting literary piracy to the punishment of her penal Code.

In 1846, England entered into a treaty with Prussia; in 1851, with France; in 1854, with Belgium (*r*).

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triment des originaux qu'on regardait comme production étrangère. La Prusse avait depuis longtemps donné un exemple de justice qui avait trouvé peu d'imitateurs, en prohibant la vente de toute édition contrefaite dans quelque partie de l'Allemagne que ce fût, quand même les auteurs ou éditeurs de l'original n'étaient pas régnicoles." *Koch* (ed. *Schoell*), *Hist. des Traités de Paix*, c. xli. s. 5 (tome iii. p. 476).

[(*qq*) 1 & 2 Vic. c. 59, afterwards repealed by 7 & 8 Vic. c. 12.]

(*r*) *Wharton*, s. 328. [See *Bar*, § 88.] It appears from Mr. Shortt's useful work on *The Law of Works of Literature and Art* [edit. 1884, p. 162,] that England also made conventions with several of the smaller German States. [In September, 1886, Great Britain had copyright conventions only with Germany, France, Belgium, Italy, and Spain. *Parliamentary Papers*, 1886, *Switzerland*, No. 3, page 9.]

[DLXXIX.A. The subject continued to receive attention both in this country and abroad, with the result that in September 1885 an International Conference was held at Berne, and a draft of a convention was there agreed to for giving to authors of literary and artistic works, first published in one of the countries joining in the convention, copyright in such works throughout the other countries joining in the convention. In the following year, the "International Copyright Act 1886" (*x*) was passed by Parliament, for the purpose of enabling Her Majesty to accede to the Convention of Berne, and of providing for its being carried into effect in the British dominions. The draft above mentioned was transformed, at a further Conference, into a definitive convention, and was signed on September 9, 1886, by the representatives of Great Britain (including India and the Colonies), Belgium, Germany, Spain, France, Haïti, Italy, Liberia, Switzerland, and Tunis. Power was reserved for other States to give in their adhesion; and provision was made for establishing an International office at Berne, and for holding future Conferences, the next to be held at Paris. Ratifications were exchanged September 5, 1887 (*xx*).

It has been considered in these circumstances unnecessary to reprint the residue of § DLXXIX. and § DLXXX. of the former editions, as the present condition of the English Law and of International arrangements has made them substantially obsolete.]

DLXXX.A. The case of *Jeffreys* v. *Boosey* decided [with respect to the now repealed Act of 8 Anne, c. 21] as follows:—The object was to encourage literature among British subjects, which description included such foreigners as, by residence here, owed the Crown a temporary allegiance; and any such foreigner, first publishing his work here, was an "author" within the meaning of the statute,

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[(*x*) 49 & 50 Vic. c. 33.

(*xx*) For the Convention of Berne see Appendix III.]

no matter where his work was composed, or whether or not he came hither solely with a view to its publication.

Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect.

An Englishman, though resident abroad, will have copyright in a work of his own first published in this country.

B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and before publication assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country.

It was holden, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition.

Per *Lords Brougham and St. Leonards.* Copyright did not exist at Common Law; it is the creature of Statute.

Per *Lord St. Leonards.* No assignment of copyright under 8 Anne, c. 21, the benefit of which is claimed by the assignee, although from a foreigner, can be good in this country, unless it is attested by two witnesses.

Per *Lord St. Leonards.* There cannot be a partial assignment of copyright (*y*).

DLXXX.B. But in the subsequent case of *Routledge* v. *Low*, Lords Cairns and Westbury expressed dissent from this construction of 8 Anne, c. 21, and intimated a doubt whether the case of *Jeffreys* v. *Boosey* would in any case be binding upon the House of Lords in the construction of the later Act (5 & 6 Vic. c. 45).

(*y*) *Jeffreys* v. *Boosey* (A.D. 1854), 4 *H. of L. Cases*, p. 815.

In *Routledge* v. *Low*, it was holden that an alien friend who, during the time of his temporary residence in a British colony, publishes, in the United Kingdom, a book of which he is the author, is, under 5 & 6 Vic. c. 45, entitled to the benefit of English copyright (*z*).

DLXXX.c. (*a*) 3. The cases decided in the English Courts on the subject of the piracy of *Foreign Trade-marks*, show a greater regard for Comity than the [earlier] decisions of the French tribunals (*b*).

In a recent case an *alien ami* manufactured, in his own country, goods, which he distinguished by a peculiar trade-mark. The goods obtained considerable reputation both in his own country and in various other foreign countries, and also in some British colonies; but it was not shown that any of such goods had ever been even introduced or imported into England. The defendant was in the habit of manufacturing in and selling in this country, goods similar in appearance, and with an exact copy of the plaintiff's peculiar trade-mark. Some of these imitative articles were sold and used abroad in countries where the *alien ami's* goods had obtained a reputation. It was holden by the Court, that he was entitled to an injunction restraining the defendant from copying or imitating the trade-mark (*c*). The doctrine seems to have been laid down in this case, that a man has no property in a trade-mark, but he has a right to prevent anybody else from using it,

(*z*) *Routledge* v. *Low* (1868), *L. R.* 3 *H. L.* p. 100; 37 *L. J.* (*Chanc.*) p. 454.

(*a*) This and the next section were §§ dxciii. dxciv. of the first edition.

(*b*) See a remarkable case, *The Emperor of Austria* v. *Day and Kossuth*, 2 *Giff. Rep.* p. 628, referred to in vol. ii. of this work, § cxiii.A. [But now the French Courts recognize the principles of Comity, at least as regards English trade-marks. *Affaire Rowland & Sons, Trib. de la Seine*, 8th May, 1878; *Cour d'Appel*, 23rd July, 1880, from Mons. Clunet's manuscript notes.]

(*c*) *The Collins Company* v. *Brown*; and *same* v. *Cowen*, 3 *Kay & Johnson's Rep.* p. 423; p. 428 (A.D. 1857).

so as to attract custom which otherwise would flow to himself. Also that a person on whom an injury is fraudulently committed may have a remedy in the Court of any country where the fraud occurs, and even although he be at the time an alien enemy.

DLXXX.D. In an important case on this subject a bill was filed by an American trading company, incorporated by the Law of the State of Connecticut, in the United States of America, for an injunction to restrain a manufacturer of Birmingham from continuing the fraudulent use of the trade-marks of the company, and for an account of the profits made by him from such use. He, by his answer, admitted the use of the trade-marks complained of; but, by way of rebuttal of the charge of fraud, stated that, in so using the trade-marks, he had only followed a custom, prevalent at Birmingham, for manufacturers of goods of the kind sold by the company to affix on the goods ordered by merchants a particular trade-mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of license from, the person entitled to the exclusive use of the trade-marks; and that he had been informed that the company themselves had ordered goods to be manufactured at Birmingham, with their own trade-mark upon them, for the purpose of sale in foreign countries. These statements were left uncontradicted by the company. The Court, upon motion for decree, ordered that an interim injunction which the defendant had previously submitted to, should be continued for a year, with liberty to the company to bring an action within that time to try their right at law; and in case of their not proceeding at law and to trial within that time, that their bill should thereupon stand dismissed with costs (*d*).

DLXXX.E. Mr. Wharton (*e*) observes, that "In Eng-

(*d*) *Collins* v. *Reeves* (V.-C. Stuart, 1859), 28 *Law Journal* (*Chanc.*), p. 56.

(*e*) §§ 326, 327, [where it is mentioned that the United States en-

"land and the United States, it is needless to say, the "counterfeiting of any trade-mark, with intent to defraud "a vendee, is indictable as a cheat at common law. The "distinction between the intent to defraud the vendee, "and that to defraud the manufacturer, seems overlooked "by both Bar and Fœlix. When a vendee is defrauded "by imposing on him an inferior article on a forged brand "or stamp, he can prosecute criminally the offender, "though no civil action may lie in favour of the foreign "manufacturer whose trade-mark is counterfeited" (*f*).

[DLXXX.F. By a Convention, signed at Paris March 20, 1883, Belgium, Brazil, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, Spain, and Switzerland constituted themselves into a Union for the protection of Industrial Property. It is thereby agreed that the citizens of each of these States shall, in all the other States belonging to the Union, as regards *Patents*, *Industrial designs* or *models*, *Trade-marks*, and *Trade-names*, enjoy the advantages which such other States grant or shall hereafter grant respectively to their own citizens. Citizens of countries not belonging to the Union, who are domiciled or have commercial establishments in Union States are put upon the footing of citizens of Union States. The Convention was acceded to by Great Britain June 1, 1884, and by the United States of America Mar. 30, 1887 (*g*)].

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tered into a treaty on the subject of commercial trade-marks with Belgium, and with France.]

[(*f*) In Missouri the infringement of a [illegible] considered a criminal offence, [illegible] *Rep.* p. 133.

For recent [illegible] 57, part [illegible] 25 [illegible]

CHAPTER XXVIII.

ACQUISITION AND ALIENATION OF MOVEABLE AND IMMOVEABLE PROPERTY.

CAPACITY TO ACQUIRE OR TO ALIENATE.

DLXXXI. HAVING considered in what the nature of moveable and immoveable property consists, and by what laws it is determined, we now approach the consideration of the rules of Private International Law with respect to the acquisition and the alienation of property by Foreigners.

DLXXXII. As it is an incident to the Sovereign Power of every independent State to have authority over all *persons* residing or being within its borders, so it is an incident to the same power to have authority over all *things* or *property* of every description within its borders.

The Laws of each State, therefore, govern the whole property of individuals, whether they be natives or foreigners.

But the same Comity which, in the application of the Law, distinguishes for some purposes between the persons of natives and foreigners, makes a distinction both as to their *capacity to acquire property*, and also as to the *form* and *manner* of its *acquisition* or *alienation*.

DLXXXIII. The following summary of the opinions of jurists upon this important point is, it is believed, correct:—

1. There are those, beginning with Huber (*a*) and ending with Savigny (*b*), who hold that this *capacity* to acquire or alienate is governed by the Law of the domicil of the acquirer or alienator.

2. There are those who hold that this capacity does not belong to the qualities of the person, as such, but to the legal working or effect of these qualities, and, therefore, that the *lex fori*, before which the matter is adjudicated upon, and not the Law of the domicil, should be applied.

3. Those who hold, with Story for their principal exponent, that, generally speaking, the Law of the domicil should be applied, but not in the case of *immoveables*. In this case, the *lex rei sitæ*, or the *Statutum reale*, must govern—a position emphatically condemned by Savigny.

But those who maintain the first opinion admit the following exceptions (*c*):

α. Where the capacity to acquire or alienate is forbidden by the Law of the territory in which the property is situated (*cc*).

β. Where it is doubtful whether the property be or be not among the *res quorum commercium non est*, the *lex rei sitæ* is to prevail.

γ. Where a question arises as to property without an owner (*bona vacantia*), or as to whether particular property can be acquired by *occupatio*.

For instance, *jura regalia*—rights of the Crown and Government with regard to mines, minerals, or treasure trove; or amber in the kingdom of Prussia. In such cases it is admitted that not only ought the *lex rei sitæ* to prevail, but that the property acquired under such a title ought to be recognized by all other States.

(*a*) *Prælect.* vol. ii. lib. i. tit. iii. App. § 12.

(*b*) *R. R.* viii. s. 367. See also *Wharton*, s. 329 [and cf. *Bar*, § 64].

(*c*) *Savigny, ibid.*

[(*cc*) For examples of this kind of prohibition, in the United States, see *suprà*, § cclxxxv.B. note (*qq*).]

DLXXXIV. Having considered what Law governs the capacity to acquire and to alienate property, we ought, perhaps, to inquire in the next place what Law governs the *form* and *manner* of acquisition and alienation. And this inquiry would lead us to an examination—

1. Of the opinions of jurists.

2. Of the domestic jurisprudence of States, expressed either in their written Codes, or in their practice manifested by public acts of the State or by judicial decisions.

The subject is, however, discussed at length in that portion of this volume which relates to Obligations; and it is only intended in this place to give the outlines of a sketch, the filling up of which the reader will find in the later part of this work.

DLXXXV. The opinions of jurists on this subject may be ranged, as on the subject of Capacity, under three classes:—

1. Those who maintain that the *lex domicilii* alone ought to govern both kinds of property.

2. Those who maintain that the *lex rei sitæ* alone ought to govern both kinds of property.

3. Those who maintain that the *lex domicilii* governs the moveable or personal, and the *lex rei sitæ* the immoveable or real, property.

DLXXXVI. 1. Those who hold the *first* of these opinions do so chiefly in relation to the property of a deceased foreigner, considering that this, of whatsoever character and wheresoever situated, forms an "*universitas juris*," to be governed by the Law of the domicil. This opinion, however, founded on an exaggeration of the doctrine of Personal Statutes, has certainly no root in the system of Private International Law (*d*), and it has a

(*d*) "Mais c'est exagérer évidemment la portée du statut personnel que de prétendre lui soumettre des immeubles par le motif, qu'ils font partie d'une succession."—*Fœlix*, liv. i. tit. ii. s. 61.

manifest tendency to interfere with the sovereignty which is vital to every independent State.

DLXXXVII. 2. Those who hold the *second* of these opinions are not numerous (*e*); they belong to the present age, and are, I believe, confined to Germany. They have lately added a host to their numbers in the adhesion of Savigny (*f*), who, in his recent work, expresses a very strong opinion upon this point. It may be expedient to state the substance of his reasoning, as it embraces the arguments of his predecessors, especially of Wächter (*g*), who is entitled to the chief place among the promulgators and maintainers of the doctrine that the *lex rei sitæ* ought equally to govern the moveable and immoveable property of foreigners.

DLXXXVIII. It is refreshing and instructive to turn from the absence of theory and system, which the decisions and dicta of English and North American lawyers too frequently exhibit, to the philosophical and luminous statement of Savigny upon this subject. After stating the arguments of those who maintain that the *lex domicilii*, and of those who maintain that the *lex rei sitæ*, is alone applicable to *moveable* property, he expounds his own opinion to the following effect:—

DLXXXIX. In considering the Rights of *Things*, we enter immediately upon the question of the dominion in which these Things are. Things are sensible and tangible; they occupy a definite *place*, and that place is the seat of the Legal Relation (*Rechtsverhältniss*) of which they are the object.

Whosoever wishes to acquire, enjoy, and exercise a right over a Thing betakes himself for that purpose to the place in which it is situate, and subjects himself willingly,

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(*e*) Tittmann, Mühlenbruch, Eichhorn, and Wächter.

(*f*) *R. R.* viii. ss. 366, 367, 368.

(*g*) *Die Collision, &c. Archiv*, Band XXIV, 292-298; Band XXV, 199-200, 383-389.

so far as his legal relation to that particular Thing is concerned, to the law in force within that place wherein the Thing is.

When, therefore, it is asserted that his Rights relating to this Thing are governed by the *lex rei sitæ*, this position rests upon the same principle as that which applies the *lex domicilii* to govern a question of Personal Status—the authority of both laws, in fact, springing from the voluntary subjection of the individual to the Law of a particular place.

The old Roman Law, indeed, knew nothing of the *forum rei sitæ*; but this doctrine was early introduced in relation to actions or suits respecting the recovery of property, and was afterwards applied to other actions *in rem*. It is true, however, that even in these instances that Law did not exclusively prescribe the *forum rei sitæ*, but left to the plaintiff the option between the *special* remedy, the *forum rei sitæ*, and the *general* remedy, the *forum domicilii* (*h*).

But this optional arrangement is too vacillating and uncertain to be adopted in modern jurisprudence. Therefore, one of the two rules must be fixed upon, and that one must be the *lex rei sitæ* (*i*): first, because that is the Law

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(*h*) *Savigny*, *ib.* s. 366, notes *b*, *c*, *d*, citing *Vatic. Frag.* § 326: the contrary is not to be inferred from *Dig.* lib. v. t. i. 24, § 2, which passage refers, not to the *forum rei sitæ*, but to the *forum originis*, which every Roman citizen had in the city of Rome, in addition to his own home, but from which *Legates* had the privilege (see chapter on Ambassadors in the second volume of this work) of withdrawing themselves. *Cod.* lib. iii. t. xix. 3. Ut Actor sequatur forum Rei. *Novellæ* lxix.

(*i*) *Donellus*, *Comment. de Jure Civili*, lib. xvii. c. x. c. xvii. He says, "There are but three exceptions to the *lex rei sitæ*.

"1. If with the consent of the owner the action has been brought elsewhere, 'est enim in consentientem cujusvis judicis jurisdictio.'

"2. If the *possessor* has *dolo malo* removed the *res* from the place where it was, to the injury of the *petitor*.

"3. If the action has been begun where the *res* was, and *pendente judicio* it has been removed elsewhere by the *possessor*."

to which the individual has by his own will in this particular matter submitted and subjected himself; secondly, because the greatest confusion would follow from adopting the *lex domicilii*, for it is to be remembered that there may be more persons than one interested in the right to the particular Thing, each of which persons may have a different domicil, and a question full of doubt and perplexity actually arises as to which domicil is to furnish the law. This doubt and perplexity is obviated by adopting the *lex rei sitæ*.

Therefore all States have adopted this rule of Private International Law with respect to immoveable or real property; but a distinction has been drawn between this kind of property, and that which is of a moveable or personal character.

It must be admitted that this distinction has been relied upon by almost all the jurists of an earlier date than the present times, and incorporated into many Codes; nevertheless, it has no foundation in reason or principle —it has arisen from a misapplication of the Law of Inheritance and Succession (*k*) to the Rights (*l*) respecting Things or Property in general, which is governed by the law of the place, and so it was declared to be by the Bavarian legislation of the middle of the eighteenth century (*m*).

Those who maintain the opposite opinion evade or

(*k*) This Law, according to Savigny, is rightly governed by the Law of the domicil. *R. R.* viii. ss. 366, 375.

(*l*) In this, as generally, Savigny closely follows Donellus (cf. *Comm. de Jure Civ.* lib. xvii. c. xvii. 12), who explains that the "hæreditas res est *incorporalis* in jure consistens," and that the "res singulæ hæreditariæ" are included in the "universitas" of the succession, and that the only "locus in quo controversia hæreditatis tractanda est" is that "ubi scilicet, qui convenitur, habet domicilium."

(*m*) *Savigny, ib.* s. 366, note *g*, *Codex Bavar. Maximil.* Theil I. Kap. ii. § 17 :—"Es soll endlich *in realibus vel mixtis* auf die Rechten *in loco rei sitæ* ohne Unterschied der Sachen, ob sie beweglich oder unbeweglich, körperlich oder unkörperlich sind, gesehen und erkannt werden."

gloss over the difficulties attendant on it. It is easy to say "the Law of the domicil shall decide;" but of *whose* domicil? of the Person legally entitled to the Thing; but who is that person?—The Proprietor. But which proprietor, if two persons claim that designation? or if the Thing has passed from one person to another, which proprietor—the old or the new one? Suppose, however, that the answer be "the Domicil of actual Possession" —then it must be recollected that there are various rights growing out of and connected with the Thing itself, which may have been the subject of transfer between individuals, all of whom may have *different* domicils.

"The principal question (*Hauptfrage*)," he continues, "still remains, namely, whether the nature and reason of the "thing furnish any ground for the position that the rights "to moveables should be subjected to a local law different "from that which governs immoveables. It must be absolutely denied that any such is furnished. The difference "of opinion upon this subject has probably originated from "too abstracted a consideration of it. I will endeavour to "make it clear that in the business of practical life the subject assumes a very different form.

"The examination will have the double result of disclosing the origin of the opinion which I combat as "erroneous, and of bringing into daylight that element of "truth which it does contain.

"If we examine the position which moveables occupy "in space, we find two extreme cases diametrically opposed "to each other, the intermediate ground between which is "occupied by many other cases with manifold gradations.

"First. The position which moveables occupy in space "may be so indeterminate and uncertain as to render it impossible to know precisely what that position is, or what "the territory is of which the local law is to be applied, "so that the notion of a voluntary submission to this local "law is entirely excluded.

"The following instances fall under this category:—

"A traveller, who with his luggage is transported by "coach or railway, passes in one day through several terri- "tories without bestowing even so much as a thought on the "one in which he happens for the moment to be. A similar "instance occurs, when a merchant sends wares into a "distant territory, during the whole time that these wares "are on their passage; more especially when these are sent "by sea to different ports, and, perhaps, to different parts "of the world in search of the best market. In all such "cases the *lex loci rei sitæ* is evidently inapplicable; we are "obliged to search for some resting-place (*Ruhepunkt*), in "which such wares are destined to remain for a longer or "for an indefinite time. It may happen that such a place is "pointed out in a manner not to be mistaken by the clearly "demonstrated intention of the proprietor, or it may happen "that this place coincides with his domicil. Take as an "example the travelling trunk, which the traveller usually "brings home when his journey is over; or the wares which "their owner has sent abroad, but which have not found a "market, and which he, therefore, brings home again, there "to await the occurrence of a more favourable season.

"It is, doubtless, the one-sided consideration of such "cases which has led to the promulgation, or the support, of "the doctrine that the local Law of the domicil was univer- "sally applicable to moveables.

"Secondly. We have to consider the case which is the "opposite to the one just discussed, namely, the case of "moveables, the destination of which binds them to remain "fixtures in a particular place.

"Such is the case of the furniture of a house, its library, "its collection of objects of art, and the moveables included "in the *inventarium* (*n*) of a landed estate, such as corn,

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(*n*) "*Inventar*" is the expression of Savigny, cf. voc. "*Inventarium*" in *Adelung's Dictionary*.—"Bewegliche Dinge, welche zu einem Grundstücke gehören, bei demselben verbleiben, mit dem Besitzer nicht verändert werden; besonders in der Landwirthschaft,

"cattle, agricultural implements. It is true that the destina-
"tion of even such things may be changed—they may be
"taken into another place or another country; but these
"changes are accidental, and are not within the actual
"intentions and present will of their owner.

"The relation between these moveables and the person
"is like that which subsists between the person and the
"domicil, which is considered at the present moment as
"permanent, though it remains susceptible of continual
"change for the future.

"There is not, in fact, a plausible reason for considering
"these things in any other light than that of immoveables.
"On the contrary, they ought, like immoveables, to be sub-
"ject to the law of the place—that is, the law of their actual
"position, and not according to the domicil of their owner
"or possessor. This is indeed the opinion of the majority of
"writers, even of those who otherwise stoutly maintain the
"distinction on principle between moveables and immove-
"ables, but who make for this particular class of moveables
"an exception to their general rule, and form them into an
"intermediate class.

"Between the two classes of moveables which have been
"discussed are to be found many others with the greatest
"variety of differences between them. For instance, the
"merchandise which the owner keeps in deposit at a par-
"ticular place which is not that of his domicil, for an
"indefinite period; so, too, the baggage which the owner
"brings with him during his sojourn in a strange country,
"and the like. The particular circumstances of each case
"must determine whether these moveables belong to the
"first or the second class. This determination will not be
"affected by the shortness or length of the period during
"which these things remain at a particular place, but by
"the nature of the rule of law about the application of

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wo die auf solche Art zu einem Gute gehörigen sämmtlichen Geräthschaften, Stücke, Vieh, Getreide u. s. w."

"which the question arises. Thus, for instance, if the "dispute arose as to the form of the alienation (*traditio* or "simple contract), a much briefer sojourn at a determinate "place would suffice to warrant the application of the Law "of the place where the thing was situate, whereas a ques- "tion of possessory title" (*usucapio*) "might be subject "to different considerations.

"Speaking generally, however, we ought to hold fast to "the application of the Law of the place where the thing is "situate" (*lex rei sitæ*), "as a general rule, and regard as "a comparatively rare exception the case of moveables "belonging to the first of the classes which have been "treated of in the foregoing remarks" (*nn*).

DXC. While Savigny is contending that there ought to be in principle no difference between the application of the law to moveable and immoveable property, he is obliged to make an admission which, in reality, is fatal to his position—viz. that where the Law of Succession to immoveable property is connected with the public and constitutional policy of the State, in this case his maxim does not apply.

Thus, in England, the succession of the eldest son to all the realty of his father is closely connected with the support of that aristocracy which, whether within or without the House of Peers, is an essential branch of the British constitution.

In France, on the other hand, the compulsory partition of landed property is not less an essential part of that constitution, which has had a Democracy, a constitutional and an absolute Sovereign, but no intermediate aristocracy (*o*).

DXCI. The Courts of Louisiana, notwithstanding the

[(*nn*) *R. R.* viii. latter part of s. 366.]

(*o*) Thus *M. Demangeat*: "Cette opinion intermédiaire, qui consiste à distinguer entre les meubles et les immeubles pour déterminer la loi qui doit régir la succession, nous paraît en définitive préférable aux deux autres. La considération qui, suivant nous, est, c'est que dans chaque état la loi sur les successions n'est qu'un corollaire de l'organisation politique."—*Du Statut Personnel, Rev. Pratique*, p. 634.

protests of Story and Livermore, agree with the doctrine of Savigny. By the Common Law of England and the United States, a sale of goods between the parties is complete without delivery; by the Roman Law (*p*), delivery is requisite. That law prevails in Louisiana. The Supreme Court of that State has decided in the most solemn manner that the transfer of personal property in that State is not complete, so as to pass the title against creditors, without delivery; though it would be complete by the Law of the domicil of the owner who transfers it (*q*).

DXCII. 3. With respect to the *third* opinion—viz. that the *lex domicilii* governs the moveable or personal, and the *lex loci rei sitæ* the immoveable or real property—that is certainly the abstract opinion which the greatest number of accredited authors and jurists conspire to recommend. But, then, in practice, and especially in recent practice, a great approach has been made to Savigny's doctrine of the *lex sitûs*. Story says: "The general rule is that a transfer "of Personal property, good by the Law of the owner's "domicil, is valid wherever else the property may be "situate. But it does not follow that a transfer made by "the owner according to the law of the place of its actual "*situs* would not as completely divest his title, nor even "that a transfer by him in any other foreign country, "which would be good according to the law of that "country, would not be equally effectual, although he "might not have his domicil there." And again:—"In "the ordinary course of trade with foreign countries, no "one thinks of transferring Personal property according "to the forms of his own domicil; but it is transferred "according to the forms prescribed by the law of the place "where the sale takes place" (*r*).

(*p*) *Cod.* lib. ii. t. iii. 20.

(*q*) *Olivier* v. *Townes*, 2 *Martin's* (*Louisiana*) *Rep. New Series*, p. 93; *Story, Conflict of Laws*, s. 386.

(*r*) *Ibid.* s. 384.

It is manifest, and admitted by the foreign civilians, as well as by English authorities, that personal property, consisting of *jura incorporalia*, such as local stocks or public funds, regulated by local laws, can only be transferred according to the *lex situs* (*s*). The peculiar case of the transfer of Ships is dealt with in a subsequent part of this volume.

(*s*) *Robinson* v. *Bland*, 2 *Burrow's Rep.* p. 1077; *et vide post*, §§ dcxxvi, dclxxiii.

[See *Williams* v. *Colonial Bank*, and *Williams* v. *London Chartered Bank of Australia*, *L. R.* 38 *Ch. D.* p. 388, in the Court of Appeal.]

CHAPTER XXIX.

OBLIGATIONS—GENERAL REMARKS UPON.

(*a*) DXCV. In every society persons must not only exist, but *act* (*aa*). The Roman Law defines "*actum* quidem generale verbum esse, sive verbis sive re quid agatur" (*b*).

Each person has his own sphere of rights limited and circumscribed by the rights of others. Within this sphere he enjoys the full liberty of acting, but he lies under an *obligation* (*c*) not to encroach, without permission, upon the sphere of his neighbour. If he does so, he lies under an *obligation* to make *reparation* to him; therefore the Roman jurists said rightly, "*obligationes ex maleficio nascuntur.*" Nevertheless it is ordained by the Author of man's nature that he should interchange his rights with his fellow-man (*d*), and should continually pass beyond the sphere of his own legal action, and change and abandon his own private rights. As a matter of fact, all men do

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[(*a*) §§ dxciii. and dxciv. are inserted as §§ dlxxx.c. and dlxxx.d.

(*aa*) *Warnkönig, Doctrina Juris Philosophica*, cap. viii. § 106, *De Factis et Obligationibus.*

(*b*) *Dig.* lib. l. t. xvi. 19.

(*c*) Though *this* idea is not conveyed by the term *obligatio*, in the Roman Law (*vide post*)—Hobbes says, with his usual perspicuity, "Where liberty ceaseth, there obligation beginneth."

(*d*) "La vie et les buts des hommes s'entrecroisent : personne ne se suffit à soi-même ; pour vivre et se développer chacun doit compter sur un grand nombre de conditions placées dans la volonté de ses semblables. C'est pour s'assurer ces conditions de la part d'une personne, qu'on entre dans un contrat avec elle ; et la fidélité dans les engagements est une condition et partant un droit de la vie sociale."—*Ahrens, Phil. du Droit*, p. 396 (Brux. 1844).

so; the consequence of this is, another class of *obligations*, arising not *ex maleficio*, but *ex facto*.

If a man enjoy or use the right of another with his consent, no obligation arises; but if this enjoyment or use be granted for a limited period, or under a condition, and the enjoyment or use be continued beyond the period, or without the fulfilment of the condition—if a man promise to *give* or *do* a certain thing, and the promisee in consequence acts in a manner in which he would not otherwise have acted with respect to his own rights or property, and the promisor does not fulfil his promise—in these cases, also, an *obligation* to make *restitution* or *reparation* arises, or, as the Roman jurists say, an *obligatio ex contractu*, or *ex quasi contractu*.

DXCVI. There may be obligations springing from promise or contract which the Civil Law of a country does not enforce (*e*), for which it allows no *action* to be brought in its Courts of municipal Law. The civil Law of all countries has prescribed that certain contracts on which an action may be brought shall be attended with certain formalities or solemnities in the execution. The *stipulatio* of the Romans, the English Statute of Frauds, illustrate this position. But there are other obligations which spring up amid the daily necessities of society, and which, wanting these formalities and solemnities, nevertheless found an action in courts of municipal law. These latter are not the growth of the peculiar character of any nation, but are common to all nations—a part of the necessary development of social life wherever it exists. In other words, there are two classes of obligations, namely, *obligationes juris civilis*, and *obligationes juris gentium*. By this latter term, *juris gentium*, are not meant the *natural obligations* of rational affections, such as gratitude, love, or obedience, but those obligations which the common neces-

(*e*) Though it does not deny that they are contracts: *vide post*, §§ dcxv, dcxvi

sities of a common humanity have everywhere introduced into social life, such as are expressed in the following passages of the Institutes:—"Ex hoc *jure gentium* omnes "penè contractus introducti sunt, ut emtio, venditio, "locatio, conductio, societas, depositum, mutuum, et alii "innumerabiles" (*f*). And of the Digest: "Ex hoc jure "gentium . . . obligationes institutæ; exceptis quibus- "dam, quæ a jure civili introductæ sunt" (*g*).

The Roman lawyers, therefore, were wanting neither in philosophical truth nor practical sagacity, when they distinguished, as we shall presently see, the various *causes of Obligation*, and divided *contracts*, the principal sources of obligations, into those which were executed—

i. Re.
ii. Verbis.
iii. Literis.
iv. Consensu.

DXCVII (*h*). All institutes of law are connected, or appear to be connected, with each other. The philosophical investigation of the character of each institute requires an investigation into the reality or unreality of this connexion.

The Rights which flow from obligations may seem, at first sight, to be connected rather with the Rights of Family, than of Things. The ties of Obligation, like the ties of family, subsist between two definite persons. On the other hand, the essence of the relation of obligation consists in the subjection of the acts of an individual to the will of a stranger. The essence of the relation of family consists in the moral and natural bond which is

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(*f*) *Inst.* lib. i. t. ii. 2.

(*g*) *Dig.* lib. i. t. i. 5.

(*h*) Savigny (*Obligationenrecht*, Band i. § 4) is the author whom I have closely followed in the observations in this paragraph.

See *An Epitome and Analysis of Savigny's Treatise on Obligations in Roman Law*, by Archibald Brown. 1872. London.

formed, continuously and insensibly, by the free co-operation of the different members of a family.

The Right to Things does not indeed require, as its basis, the two definite persons who are indispensable to the Right called *Obligation*; but the two rights agree in this—that they both consist in the dominion of a definite person over a portion of the external world. Taken together, they make up the whole Right of Property of which they are co-ordinate portions (*i*), though their operation be very different.

For in the Right to Things, the operation of the principle of Property is to sever—in the Right of Obligation, to bind together.

Moreover, there is this further affinity between the two Rights—the acts which the Obligor is bound to do for the Obligee are capable of being estimated in money; and the most frequent and most important obligations have no other object than the use or acquisition of Property.

DXCVIII. The affinity of the rights of obligation to the rights of Family has been pointed out. Nevertheless, in the general system of jurisprudence, the rights relating to Family, to Inheritance, and Testamentary disposition, and the rights relating to Things or to Corporeal Property, are discriminated (*k*) from the rights relating to Obligations, by some striking characteristics. The former are necessarily confined within a narrow range of positive Law. The liberty of individuals as to these rights is hemmed in within certain fixed limitations of instituted rules, the general features of which are the same in all civilised States.

The Rights relating to Obligations are of different kinds. With respect to them, individual liberty has far wider scope; and the rules of instituted law concerning them are of greater number and variety. Moreover, though many and various laws have been gradually and slowly built up to

(*i*) *Savigny, R. R.* i. ss. 56–8.
(*k*) *Savigny, Obligationenrecht*, i. § 4.

meet particular exigencies of society, which have generated particular obligations, the obligations by which men may be bound are not limited in number or character. Their category is not exhausted by past legislation or judicial decision. Obligations are of necessity continually increasing and assuming new forms, as the state of society becomes more complicated and artificial (*l*); and when direct precedent is wanting, the *principles* of instituted law must be, from time to time, flexibly applied for their adjustment (*m*).

The principles of this *proprium jus* must be derived from the philosophical investigation of the nature of the Right of Obligation.

DXCIX. There is also another marked and peculiar feature in the history of the development of the Law of Obligations. It is this, that with respect to it the doctrines of the Roman Law have been more largely copied than those of any other portion of this jurisprudence into the Municipal Law and Codes of Europe.

Even England has not wholly denied herself this great advantage; for, though her Common Law has, for the most part, either not applied, or misunderstood and misapplied, the Roman Law on this subject, many of its principles have found their way—owing partly, no doubt, to the fact of the Lord Chancellors having, before the Reformation, been ecclesiastics versed in the Civil and Canon Law—into the English prætorian or equity jurisprudence.

An intimate acquaintance, therefore, with the provisions of the Roman Law upon Obligation, is indispensable both to those who would thoroughly master the subject, and also

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(*l*) "Während die dinglichen Rechte einen ziemlich fest begrenzten Kreis von rechtlichen Beziehungen zur Sache nicht leicht überschreiten, bietet das Obligationenrecht eine unendliche Fälle der mannichfaltigsten Varietäten dar: sein Gebiet ist unermesslich wie alle Formen des geselligen Verkehrs unter den Menschen."—*Blume, Deutsches Privatrecht*, § 252.

(*m*) *Savigny, Oblig. ubi sup.*

to those who have to expound or to administer Private International Law (*o*).

The authority of the Roman Law upon Obligations in the Codes of France may be estimated from the remarks of one of the most recent French commentators (*p*), that from the article 1100 to the article 1384 of the French Code, there is scarcely a rule upon the subject which is not borrowed more or less directly from this source. Zachariæ observes, in his excellent work on the French Code, that the compilers of that Code drew not only the general principles of Obligation, but those of each particular contract (*q*), from the Roman Law, which presented a model difficult to equal, and it may be said almost impossible to excel (*r*).

The examination of the treasures bequeathed to us by the Roman Jurisprudence will form the subject of the following chapter.

(*o*) "Ferner haben sich in dem Obligationenrecht die Rechtsbegriffe und Grundsätze der Römer, vorzugsweise vor anderen Rechtstheilen, in anerkannter Wirksamkeit erhalten."—*Savigny, Oblig.* i. § 4.

(*p*) *Traité Elémentaire de Droit Romain*, tome ii. p. 58, par *R. de Fresquet.*

(*q*) This does not, as will be seen, extend to the forms of *action* by which obligations may be enforced.

(*r*) *Droit Civil Français*, par *K. S. Zachariæ, traduit de l'Allemand sur la cinquième édition*, &c., par *G. Massé* et *C. Vergé*, 1857, tome iii. p. 342.

CHAPTER XXX.

OBLIGATION—ITS MEANING IN ROMAN LAW.

DC. *OBLIGATIO* is thus defined in the Roman Law:—

"Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei secundum nostræ civitatis "jura" (*a*).

These *jura*, it is well observed by Donellus, embraced both the *jus civile* and the *jus gentium* (*b*).

Again:—

"Obligationum substantia . . . in eo consistit . . . ut "*alium nobis obstringat* ad dandum aliquid, vel facien- "dum, vel præstandum" (*c*).

The use of the expression *obligatio*, in the Roman Law, is very commonly misunderstood; it is construed without regard to its subject or its origin. It has been used in its popular sense in the foregoing volumes of this work, which

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(*a*) *Inst.* lib. iii. t. xiii. præfatio.

(*b*) Donellus explains (*De Jure Civ.* lib. xii. c. i. 5, 12, 13, 15) admirably every part of this question.

"*Vinculum*—Translatione ductâ a vinculis corporalibus: et rectè ductâ: quia quod efficit vinculum corporale in his qui vincti sunt, id efficit jure obligatio in his qui sunt obligati.

"*Solvendæ*—Solvere est præstare non quidvis, sed quod debeas . . . præstatio rei debitæ.

"*Rei*—Non solum *res* sed etiam *facta* . . . ut sive quid ex obligatione *dandum* est, detur, sive quid *faciendum*, ita præstetur et fiat. Hoc exigit verbum *rei*, quod, cum per se ponitur, generale est.

"*Secundum nostræ civitatis jura*. . . . Aliam enim necessitatem præstationis habet *jure gentium naturalis obligatio*, aliam *jure civili*, *civilis*. Atque hæc sunt jura duo civitatis nostræ."

(*c*) *Dig.* lib. xliv. t. vii. 3.

relate to *Public* International Law (*d*), namely, as the mere correlative of *jus*; or, as it might be said in ordinary English, if one man has a right, another man lies under an obligation to respect it. The German jurists, Hugo and Savigny (*e*), following Donellus, are careful to demonstrate the error of this opinion, when applied to civil or municipal Law.

In the first place, it unduly narrows the force of the expression *obligatio*, confining its force to the Status of the obligor, and excluding that of the obligee.

In the second place, it unduly widens the expression *obligatio*, by making it applicable to every part of the law which relates to individuals—as, for instance, to the law of property, and even carrying it beyond the limits of Private into those of Public Law—as, for instance, the obligations of the subject to his Government (*f*).

The technical expression *obligatio*, in its true meaning, embraces two different and opposite matters. It is correctly applied to signify either the diminished rights of the Obligor, or the extended rights of the Obligee.

The following passage from the Institutes illustrates this position:—

"In utrâque tamen obligatione una res vertitur, et vel "alter debitum accipiendo, vel alter solvendo, omnium "perimit obligationem, et omnes liberat" (*g*).

The image which the expression *obligatio* presents is that of a *bond*. It was chosen to represent a *bound* and un-free will. It is nearly allied to other technical expressions of Roman Jurisprudence, *nectere* and *nexum contrahere*, *contractus solvere* and *solutio* (*h*).

(*d*) See vol. iii. § i.

(*e*) *Savigny, Oblig.* i. § 3.

(*f*) See *Donellus*, lib. xii. c. iv.

(*g*) *Inst.* lib. iii. t. xvi. 1.

(*h*) The true technical sense of *obligatio* has been pointed out, but it should be observed that this expression sometimes denotes the *groundwork* or *origin* of any legal relation, as in this passage, "In

DCI. Every *convention* is, the Roman lawyers said, of two kinds. Both, indeed, proceed from the free-will of individuals; but, having regard to its *origin*, it appears that one is sanctioned by the general usage of civilized nations (*conventio jure gentium*) (*i*); the other is confirmed by a particular municipal law (*legitima conventio*) (*k*). Having regard to the *operation* and *effect* of a convention, the same proposition may be thus stated: a convention may generate a *naturalis, i.e.* a *juris gentium obligatio*, or a *civilis obligatio* (*l*).

Thus, though both have the same origin (*m*), they were not always attended with the same result.

The civil obligation was also enforceable by a civil *action* (*parit actionem*); the natural obligation was not so enforceable (*non parit actionem, sed exceptionem*); as will be seen when the particular species of *obligatio* called *contractus* is discussed; in which this distinction of obligations into those enforceable and those not enforceable by action, receives its fullest and clearest illustration (*n*).

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tutelâ *ex unâ obligatione* duas esse actiones constat"—(*Dig.* lib. xxvii. t. iii. 1, § 21; see *Savigny, Oblig.* i. § 3, note (*k*), for this and other instances); sometimes also the *pawning* or *pledging* of a thing, because thereby a legal relation arises with respect to the thing, similar to that of the *debitor*, in the case of an *obligatio*. Thus we find the expressions *obligatio prædiorum* and *nectere pignori*. *Savigny, Oblig. ubi sup.* note (*l*); *Dig.* lib. ii. t. xiv. 52, § 2; lib. xiii. t. vii. 27.

(*i*) "Juris gentium, non quæ inducitur jure gentium, sed quæ, inducta ab hominibus, jure gentium probatur valetque ad agendum." —*Donellus*, lib. xii. c. ix. 3.

(*k*) "Non quæ inducta sit lege, sed quæ lege aliquâ confirmetur." —*Ibid.*

Vide infrà, § dcv., note (*b*), on the distinction between the use of "legitima conventio," by Paulus and Ulpian.

(*l*) *Savigny, Oblig.* ii. § 72.

(*m*) "Non enim jus inducit, ut quid homines conveniant aut paciscantur inter se, quæ cuivis libera sunt: sed quæ ab illis sunt pacta aut conventa, ea jus probat aut improbat, ex illis actionem dando, ubi res actionem desiderat, hîc denegando."—*Donellus, ubi supra.*

(*n*) *Savigny, Oblig. ubi sup.*

DCII. It is, as we have seen, from some *act* of a person that the *obligatio* arises. An *obligatio* is incurred by an act of the obligor either (1) with or (2) without his consent.

If, *with his consent*, he has bound himself to another to do or abstain from doing something, he must keep his faith. He has made a *contract*—"Is consensus de re aliquâ præ-"standâ *contractus* est" (*o*). He may also be bound *without his consent* (*p*), in two instances—(1) by intermeddling in the affairs of another, constituting himself his agent; or (2) by an act of injury done to another (*pp*).

In the former case he is bound by the obligation of what the Roman Law called a *quasi contractus*; so called because this intermeddling is neither a *maleficium* nor a *contractus*, but more nearly allied to the latter (*q*).

In the latter case, the obligor has either committed a crime, or done an accidental injury (more or less venial) to another. He is thereby bound *ex delicto* or *maleficio*, or *ex quasi delicto* or *maleficio*. Hence, the famous fourfold division of the *facta* which founded a *civilis obligatio* (*r*) in Roman Law. Of these the *contract* is of the greatest importance.

DCIII. The particular relation in which two persons, between whom an *obligatio* subsists, stand towards each other, is designated in the Roman Law by the technical expressions of *creditor* and *debitor*, *creditum* and *debitum*. These expressions are used without any reference to the

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(*o*) *Donellus*, lib. xii. c. v. 12.

(*p*) "Extra consensum duo sunt in facto nostro, quæ nos aliis eo facto ipso jure obligent, *rerum alienarum administratio suscepta*, et *delictum*."—*Ibid.*

[(*pp*) "Obligamur aut re, aut verbis, aut simul utroque, aut consensu, aut lege, aut jure honorario, aut necessitate, aut ex peccato." *Dig.* lib. xliv. t. vii. 52.]

(*q*) To the English lawyer an illustration is offered by the doctrine that a man by intermeddling without title with the effects of a deceased person becomes *Executor de son tort*.

(*r*) *Donellus*, *ubi sup.* c. v. 2.

origin of the *obligatio*, though in the earlier period of the Roman Law they were restricted to the case of a loan. But Gaius observes, "Creditorum appellatione non hi tan-" tum accipiuntur, qui pecuniam crediderunt: sed omnes, " quibus ex quâlibet causâ debetur " (*s*).

DCIV. Apart from the advantage incident to a thorough and philosophical knowledge of the subject of Obligations, some acquaintance with the nomenclature and reasoning of the Roman Law is necessary to the student of Private International Law, upon two grounds—First, as has been already mentioned, in order that he may understand the true meaning of the language of the commentators upon this law, who take for granted (as Grotius in his treatise on Public International Law does), in their readers, a knowledge of the Roman Law.

Secondly, because the Roman Law not only forms the basis of the Continental Law upon this subject, but also is used to supply the deficiencies and silence of their positive law or written codes.

This latter advantage is forcibly pointed out in Savigny's last work (*t*).

(*s*) *Dig.* lib. l. t. xvi. 11, *et vide* 10.
(*t*) See *Savigny, Oblig.* i. § 14; ii. § 76.

NOTE TO THE FOREGOING CHAPTER.

SMITH'S "DICTIONARY OF GREEK AND ROMAN ANTIQUITIES."

(*Obligationes.*)

"There is no special name in the Roman Law for a right against a determinate person or determinate persons. The name for ownership is *Dominium*, to which is opposed the name *Obligationes* as descriptive of rights against determinate persons.

"It is correctly remarked (*Austin, An Outline of a Course of Lectures on General Jurisprudence*) 'that in the writings of the Roman lawyers the term *obligatio* is never applied to a duty which answers to a right *in rem*,' that is, a right which is good against all the world. But, as the duty answering to a right *in rem* is only the duty of forbearance, that is, of not doing anything to interfere with the right, there is no inconvenience in the want of a name: the right to the exclusive enjoyment of anything (*corpus*) is ownership; all other people are not owners: as soon as an act is done which is an infringement of an owner's right, or, in other words, a *delictum* (in one sense in which the Romans use this word), an obligation arises by force of such act (*obligatio ex delicto*), and gives the injured person a right of action against the wrong-doer."

CHAPTER XXXI.

CONTRACTUS IN ROMAN LAW.

DCV. We have now to consider that source of Obligation called Contract.

The first division of *Conventiones* (*a*) by the Roman lawyers relates to their

1. *Historical Origin;* viz.
   (i) *Legitimæ Conventiones* (*b*).
   (ii) *Juris Gentium Conventiones.*

The explanation of this division is the same as has been given with respect to *obligations*, of which, in fact, it is only an application to that particular source of obligation called *Contracts.*

It is to be observed, however, that the *jus civile* recognized and gave effect to—that is, rendered actionable, sup-

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(*a*) *Dig.* lib. ii. t. xiv. De Pactis.
Ib. lib. xliv. t. vii. De Obligationibus.
Inst. lib. iii. tt. xiv. xv. xvi.
Cod. lib. iv. t. x.
Savigny, Oblig. ii. § 52.

(*b*) ["Conventionum autem tres sunt species, aut enim ex publicâ causâ fiunt, aut ex privatâ: privata aut legitima, aut juris gentium. Publica conventio est, quæ fit per pacem, quoties inter se duces belli quædam paciscuntur."—*Dig.* lib. ii. t. xiv. 5, *et vide* 6, 7.] Ulpian's expression of "*legitima conventio*" referred to the ancient solemn contracts. The expression as used by Paulus (*ibid.* 6), "*Legitima conventio* est quæ *lege* aliquâ confirmatur," is totally different—referring to a *convention* not properly belonging to the category of *contract*, but accidentally clothed with that character by a particular *lex.*

Savigny (*ubi supra*) fully explains this and the error of supposing that this passage in Paulus warranted the notion that *pactum legitimum* meant a *pactum* on which an action might be brought by virtue of an Imperial Constitution.

plied with a *causa*—all the more important contracts of the *Jus Gentium*, as the contracts of Sale, Loan, Hiring, and the like.

The *Legitima Conventio* (*c*), strictly so called, disappeared in the Justinian compilations.

2. The next division relates to the character of the contract, whether it be *unilateral* or *bilateral*; though, as Savigny remarks, the Roman Law had no strictly technical expressions of this kind (*d*).

The unilateral contract presented the simplest form of obligation; according to it one party was creditor, another debtor.

The contracts arising from Loan, from Promise of a Gift, from the *stipulatio*, belonged to this division.

The bilateral contract is illustrated by Sale, Hiring, Partnership.

Between these two kinds, and partaking of the nature of both, the Romans placed the *Commodatum*, *Depositum*, *Mandatum*.

3. Another division relates not to the legal form of the contract, but to the object of the contracting parties—viz.

The division into contracts,—

(i) Which had for their object the exclusive advantage of one party, which must, of course, be also unilateral; as in the instance of the *Promise of a Gift*, by which the condition of one party was directly bettered, or of a *Depositum*, by which the condition of neither party was directly bettered, but one obtained through the other the advantage of security for his property.

(ii) A contract which had for its object the advantage of both parties, but which might be *unilateral*, as in the case of a Loan for Interest; *bilateral*, as in the case of a Sale or Hiring.

This division is called by modern writers *conventio lucra-*

(*c*) *E.g.* the *nexus*—*dotis dictio*—*literarum obligatio*.
(*d*) *Savigny, Oblig.* ii. § 52, num. 2.

tiva or *gratuita*, and *conventio onerosa*; but these are not technical expressions of Roman Law (*e*).

4. Another division relates to the particular form of action by which certain contracts are protected.

(i) *Contractus stricti juris*, which were protected by *Actiones stricti juris*, or *condictiones*.

(ii) *Contractus bonæ fidei*, which were protected by *actiones bonæ fidei* (*f*).

It is to be observed that this division is not identical with the division into *legitimæ*, and *juris gentium conventiones*, though sometimes erroneously supposed to be so (*g*).

DCVI. The true signification of the word "obligatio" has been explained.

It is also of importance to the student of this branch of Private International Law to understand accurately the senses in which the Roman Law used the words *reus*, *correus*, *conventio*, *contractus*, *pactum*, *causa*, which so frequently occur, both in the compilations of that Law and in the commentaries upon it (*h*).

The term *rei* (*i*) comprises all the parties, whether two or more, whether *creditores* or *debitores*, to an *obligatio*. Sometimes persons under the same obligations are called *correi*.

Properly and technically speaking, *conventio* is, according to the Roman Law, the *genus*, of which *contractus* and *pactum* are two *species* (*k*).

(*e*) *Savigny, Oblig.* ii. § 52, num. 3. "Des dispositions à titre gratuit" is a well-known branch of French Law.

(*f*) *Savigny, ubi sup.* num. 2.

(*g*) *Ib.* § 72.

(*h*) *Ib.* i. § 3, ii. §§ 72, 73.

(*i*) "Reos autem appello non eos modo qui arguuntur sed omnes quorum de re disceptatur: sic enim olim loquebantur."—*Cic. de Or.* lib. ii. 43.

"*Conventionis* verbum generale est, ad omnia pertinens, de quibus negotii contrahendi transigendique causâ consentiunt qui inter se agunt."—*Dig.* lib. ii. t. xiv. 1, § 3.

(*k*) *Pactum—conventum—pactio—conventio* are often used, however, as the general names for any agreements.

Contractus is the convention which generated a *civilis obligatio*, and therefore founded an *actio*, or action at law. *Pactum*, or *nudum pactum* (*l*), generated a *naturalis obligatio* (*m*) only, and therefore did not found an action at law, but only the defensive rights of Equity or Prætorian Law, called *exceptio* (*n*) and *retentio*.

This form of the civil action was technically called the *causa* of the contract (*o*). The word *causa* is, indeed, sometimes used in the material and untechnical sense of the motive cause (*p*), but the former is the proper sense; and it is a mistake of Blackstone (*q*) and Kent (*r*), indicating a most superficial acquaintance with the Roman Law, to consider the English word "consideration" as identical with the Roman *causa*.

DCVII. The principal division of the subject of obligation in the Roman Law related to its *effect* and *operation*; and with reference to this, conventions were divided into those upon which an action might, or might not, be brought.

It may be convenient to place before the reader in this place the celebrated language of Ulpian incorporated in the Digest (*s*):—"Juris gentium conventiones" (he says) "quædam *actiones* pariunt, quædam *exceptiones*. "Quæ pariunt actiones, in suo nomine non stant, sed" (What can be more happily expressed?) "*transeunt in* "*proprium nomen contractûs*, ut emtio, venditio . . .

(*l*) *Vide post*, further observations as to *pactum* generally.

(*m*) This distinction of *naturalis* and *civilis obligatio* corresponds with the division of *legitimæ*, and *juris gentium conventiones*, mentioned before.

(*n*) *Dig.* lib. ii. t. xiv. 7, § 4; *Mackeldey, Syst. Jur. Rom.* lib. ii. § 363.

(*o*) *Savigny, Oblig.* ii. § 72.

(*p*) *Puchta, Pandekt.* § 257:—"Si quis sine *causâ* ab aliquo fuerit stipulatus, deinde ex eâ stipulatione experiatur."—*Dig.* lib. xliv. t. iv. 2, § 3.

(*q*) *Comment.* Book ii. chap. xxx. (vol. ii. p. 444.)

(*r*) *Comment.* vol. ii. p. 463. The error is corrected in a note to the edition of 1851.

(*s*) *Savigny, Oblig.* ii. § 72.

Sed et si in alium contractum res non transeat, subsit tamen *causa*; eleganter Aristo Celso respondit, esse obli- "gationem. . . . Sed *cum nulla subest causa præter* "*conventionem*, hîc constat non posse constitui obliga- "tionem. Igitur *nuda pactio* obligationem non parit, sed "parit exceptionem" (*t*).

Originally, therefore, *contractus* denoted an actionable convention, and *pactum* one not actionable.

In course of time, however, the stern Civil Law yielded, and conventions, which were not *contractus*, became actionable; and though the distinction remained, so to speak, in the books, practically many *pacta* became actionable, though without a technical name, which the glossators endeavoured, not very happily, to supply, by speaking of *vestita*, as opposed to *nuda pacta* (*u*). *Pactum*, therefore, cannot be always considered as a convention which did not found an action.

DCVIII. Upon this division of contracts into *actionable* and *not actionable*, the Roman Law founded the four species of *actionable contracts* already adverted to:— "Obligationes" (both Gaius and Justinian said) "quæ sunt "ex contractu, aut *re* contrahuntur, aut *verbis*, aut *literis*, "aut *consensu*" (*x*).

(*t*) *Dig.* lib. ii. t. xiv. 7, §§ 1, 2, 4; *et vide ibid.* tit. xiv. 45. "Divisionis placitum, nisi traditione vel stipulatione sumat effectum ad actionem, ut nudum pactum, nulli prodesse poterit." And again, Ulpian, speaking of an *action* founded on a promise of reward for discovering a fugitive slave, says, "Et quidem *conventio* ista non est *nuda*, ut quis dicat ex pacto *actionem* non oriri, sed habet in se negotium aliquod: ergo civilis actio oriri potest, id est præscriptis verbis."

Dig. lib. xix. t. v. 15.

Cod. lib. ii. t. iii. 21–28 (*De Pactis*).

Savigny, Oblig. ii. § 72, note (*e*).

See also *Warnkönig's Institutiones Juris Romani Privati*, p. 287.

(*u*) *Savigny, Oblig.* ii. § 73, nn. (*x*) (*y*).

(*x*) *Gaius*, iii. 89. *Inst.* lib. iii. t. xiii. 2; tt. xiv. xv. xxi. xxii.

[The *Digest* (lib. xliv. t. vii. 1) says, "Obligationes ex contractu, aut re contrahuntur, aut verbis, aut consensu."]

DCIX. Of these four species of *obligationes ex contractu*, two (*consensu*, *re*) are distinguished in principle from the two other ones (*verbis*, *literis*) (*y*).

The *causa* by which a convention passes from the category of *pacta* and enters that of *contractus*, and becomes protected by a *civilis obligatio* or *actio*, is either *res* or *consensus*.

a. Re contracta obligatio is the title of a contract which was originally concluded by the delivery of a thing, which the donee bound himself to restore to the donor. And under this particular aspect this contract embraced the four species of—

1. Mutui datio.
2. Commodatum.
3. Depositum.
4. Pignus.

β. Consensu contracta obligatio was the title of a contract which, on the ground of its substance and contents, was *actionable*, and did not require the aid of any technical or external *causa*.

Under this contract were ranged the four species of—

1. Emtio, venditio.
2. Locatio, conductio.
3. Societas.
4. Mandatum.

DCX. The two remaining kinds of contract relate to the forms of the particular convention; but there is a more (*z*) general aspect under which this contract of consent must be regarded: according to the Roman jurist, it had for its *object* not only the *giving of a thing*, but also the *doing of an act*; and hence arose the famous division, which has found its way into modern continental juris-

(*y*) *Savigny, Obl.* § 72.
(*z*) *Ibid.* § 73.

prudence, and has been even eulogized by the English Blackstone (*a*).

1. Do ut des.
2. Do ut facias.
3. Facio ut des.
4. Facio ut facias (*b*).

This contract, under this general aspect, did not produce the particular *actio commodati* or *depositi*, but an *actio* which comprehended all cases under the name of *actio præscriptis verbis* or *actio civilis*.

γ. *Verborum obligatio* is the title of a contract which was entered into through the medium of the *spoken* question of the Creditor and the answer of the Debtor, both conducted according to a set form of words (*c*): hence arose the unilateral contract which, under the name of *Stipulatio*, was, until the time of Justinian, the peculiar and favourite form of Roman convention, and under which title some of the most important doctrines relating to Obligation and Contract are, even in the Justinian compilations, discussed (*d*).

δ. *Literarum obligatio* was the title of a contract which, before the time of Justinian, was concluded through a particular form of *written* words, and founded on the domestic manners of the old Roman citizens with respect to money transactions (*e*).

(*a*) *Commentaries*, Book ii. chap. xxx. (vol. ii. pp. 445–5.)

(*b*) Sometimes (*Warnkönig, Instit.* § 350) called *contractus innominati*, or *incerti*, but improperly according to Savigny.

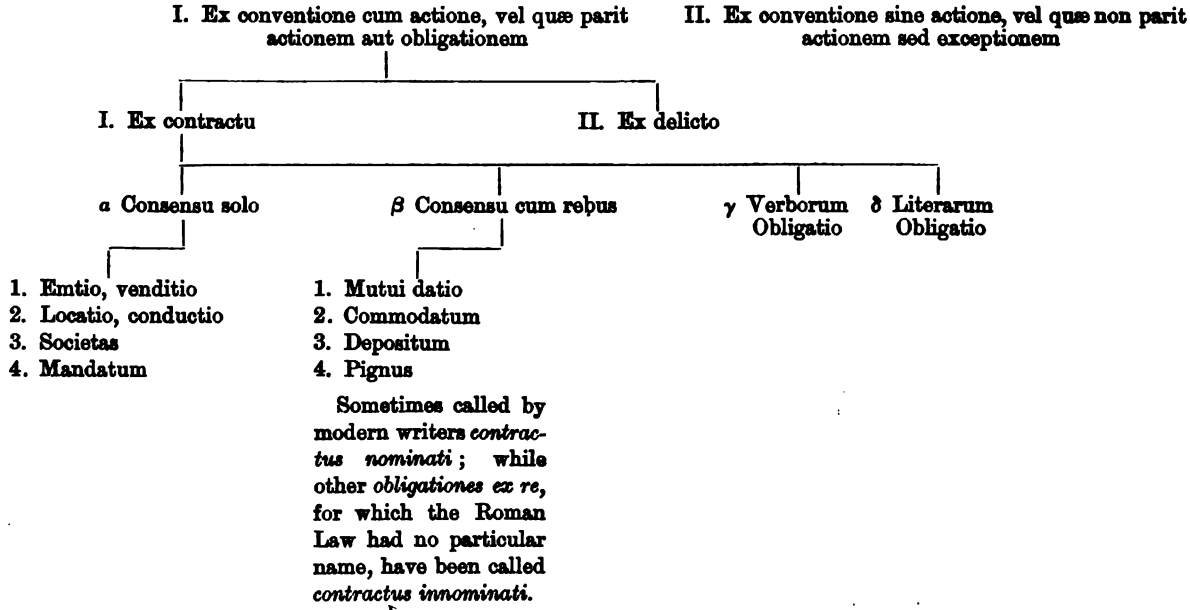
(*c*) "Dare spondes? Spondeo," cf. *Plautus, Captivi*, act. iv. scen. ii. 118.

["Dabis? Quidni?" *Dig.* lib. xlv. t. i. 1, § 2. "Spondes? Spondeo. Promittis? Promitto. Fidepromittis? Fidepromitto. Fidejubes? Fidejubeo. Dabis? Dabo. Facies? Faciam." *Inst.* lib. iii. t. xv. 1.]

(*d*) [*Dig.* lib. xlv. t. i. *Inst.* lib. iii. t. xv.] *Warnkönig, Instit.* § 452.

(*e*) [*Inst.* lib. iii. t. xxi.] *Mackeldey, Syst.* lib. ii. § 414. See his very learned note.

OMNIS OBLIGATIO NASCITUR—


I. Ex conventione cum actione, vel quæ parit actionem aut obligationem
II. Ex conventione sine actione, vel quæ non parit actionem sed exceptionem
I. Ex contractu
II. Ex delicto
α Consensu solo
β Consensu cum reþus
γ Verborum Obligatio
δ Literarum Obligatio
1. Emtio, venditio
2. Locatio, conductio
3. Societas
4. Mandatum
1. Mutui datio
2. Commodatum
3. Depositum
4. Pignus
Sometimes called by modern writers *contractus nominati*; while other *obligationes ex re*, for which the Roman Law had no particular name, have been called *contractus innominati*.

CHAPTER XXXII.

OBLIGATIONS—ENGLISH LAW.

DCXI. THE Law of England and of the United States of North America upon the subject of Obligation (*a*) is principally derived from the following sources:

α. The judgments of Courts of Common Law (*aa*).

β. The Statute of Frauds (*b*).

γ. The judgments of the Courts of Equity.

And to these may be added, with respect to some of the States which constitute the great North American Republic,

δ. The Roman Law.

DCXII. The Common Law (*c*) of England considers

(*a*) English authorities referred to: *Blackstone's Commentaries*, book ii. c. xxx. Title by Contract. *Stephen's Commentaries*, book ii. pt. ii. ch. v.

The Law of Vendors and Purchasers of Estates, by E. Sugden, Lord St. Leonards, especially c. iv. Of Parol Agreement, general construction of statute.

Smith's Law of Contracts.

Addison's Law of Contracts.

United States authorities:

Kent's Comm. vol. ii. lecture 39. [The starred paging is given.]

[(*aa*) In England the Courts of Common Law and Equity have now been fused into one Supreme Court of Judicature, which administers both law and equity, giving all the remedies which before the fusion either set of Courts could give (36 & 37 Vic. c. 66); and a similar fusion has been made in Ireland (40 & 41 Vic. c. 57).]

(*b*) This Statute is generally adopted throughout the United States of North America with the exception of Louisiana. *Kent*, vol. ii. p. 494.

(*c*) Blackstone remarks (book ii. c. xxx., vol. ii. p. 443) that "almost all the rights of personal property (when not in actual

obligations only under the category of contracts, which it technically divides into three classes—

i. Contracts by matter of record.
ii. Contracts under seal or by deed, called covenants.
iii. Contracts not under seal or by deed, called simple contracts, or contracts by parol.

Practically, however, the two latter classes are alone of importance.

DCXIII. The Common Law defines a Contract as an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing. The agreement may convey an interest in possession; as when goods are delivered and the price paid, that is, a *contract executed*. Or it may convey an interest *in futuro* or in action; as where a vendor agrees to sell and deliver goods, and a vendee agrees to accept and pay for them at a future time, that is, an *executory contract*. It also considers Contracts as *express* or *implied*,—the former when the parties express their meaning, the latter when the law presumes a contract for some value given or service rendered.

The term "*Consideration*" is of great importance in English Law; it means, speaking generally, a compensation, a *quid pro quo* of an adequate character, moving from the promisee, promised by him, not by a third party (*d*), to the promisor, an inducement not of morality, affection, or honour, but of a kind which municipal law can estimate; or, as it has been perhaps best defined, "any benefit to the "person making the promise, or any loss, trouble, or in- "convenience to, or charge upon, the person to whom it is

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possession) do in great measure depend upon contracts of one kind or other, or, at least, might be reduced under some of them; which, indeed, is the method taken by the Civil Law; it having referred the greater part of the duties and rights, which it treats of, to the head of Obligations *ex contractu* and *quasi ex contractu*."

(*d*) *Smith, Contracts*, Lecture IV.

"made" (*e*). The consideration must not be contrary to law, public policy, or good morals.

Such a consideration is essential to the validity of a Contract *not under seal*, except in the instance of bills of exchange and negotiable instruments which have passed into the hands of third parties—that is, of innocent indorsees—without notice of the original defect (*f*).

The mistake which English lawyers and writers on law make in supposing that they are following the Roman Law when they apply the maxim *ex nudo pacto non oritur actio*, and imagine that the English technical word "consideration" and the Roman technical word "causa" are convertible terms, has been already remarked upon (*ff*).

This necessity of showing or proving a consideration is also of importance, because it is the mark of distinction between what are called Simple Contracts, and Contracts by Deed. In the case of the latter, the law presumes, on account of the solemnity of their form, that they have been made upon a good and sufficient consideration.

The presumption, however, may be rebutted by showing that it was founded on an illegal and immoral consideration.

By proving this, a man may defend himself from his liability to a contract expressed by deed, but not by showing that there was no consideration.

DCXIV. The English Law about written contracts not expressed in *deeds*, involves some very subtle considerations, especially as to their proof. On the one hand, it is an inflexible rule that a contract reduced into writing shall be proved by that writing only, and shall not be contradicted or altered by *contemporaneous* verbal expressions. On the other hand, though it is not lawful to show that the meaning

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(*e*) *Smith, ubi sup. Kent*, vol. ii. pp. 463–465.

(*f*) The settled rule in England and in the North American United States.—*Kent, ibid.* p. 464, and cases there cited. [See *Smith's Mercantile Law*, Book iii. ch. i. § 8.]

[(*ff*) *Suprà*, § dcvi.]

of a written contract was varied by words at the time of making it, it is sometimes lawful to show that it was *subsequently* so varied, that, in fact, a *new agreement* was made.

But, though this may be done where the contract is one which the Law does not require to be in writing, yet, where a writing is necessary, it cannot be allowed; for, if it were, the effect of the verbal evidence would be to turn a contract, which the Law requires to be in writing, into one partly in writing and partly in words (*g*).

Where, indeed, parties have contracted with reference to some known and established *usage*, in such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written terms. Yet even in such cases the English Courts never admit evidence of a usage inconsistent with the written contract (*h*).

DCXV. The foregoing observations relate to Contracts at *Common Law*—that is, to contracts not governed by any Act of Parliament. We have now to consider them as affected by the Statute of Frauds. This Statute was passed in 1677, the twenty-ninth year of the reign of Charles II., and is the third chapter of the Statute-book of that year. "It is said" (as Mr. Smith observes) "to have "been the joint production of Sir Matthew Hale, Lord "Keeper Guilford, and Sir Leoline Jenkins, an eminent "civilian (*i*). The great Lord Nottingham used to say of "it, '*that every line was worth a subsidy*;' and it might now "be said with truth that every line has *cost* a subsidy, for "it is universally admitted that no enactment of any "legislature ever became the subject of so much litigation. "Every line, and almost every word of it, has been the "subject of anxious discussion, resulting from the circum-"stance that the matters which its provisions regulate are

(*g*) *Smith, Contracts*, Lecture II.
(*h*) *Smith, ibid.*
(*i*) *Vide antè*, vol. i. Preface to First Edition, p. xlii.

"those which are of everyday occurrence in the course of "our transactions with one another" (*k*).

The two sections which mainly affect contracts are the 4th and the 17th (*l*). The 4th section enacts, "That *no* "*action shall be brought* (*m*) to charge any executor or ad- "ministrator upon any special promise to answer damages "out of his own estate; or whereby to charge the defendant "upon any special promise to answer for the debt, default, "or miscarriage of another person; or to charge any person "upon any agreement made upon consideration of marriage; "or upon any contract or sale of lands, tenements, or "hereditaments, or any interest in or concerning them; or "upon any agreement that is not to be performed within "the space of one year from the making thereof; unless "the agreement upon which such action shall be brought, "or some memorandum or note thereof, shall be in writing, "and signed by the party to be charged therewith, or some "other person thereunto by him lawfully authorised." The words "*no action shall be brought*" in this Statute have received an important construction in their bearing upon that class of contracts which belong to Private International Law. The English Courts have holden that this enactment does not affect the *solemnities* of the contract, but only the rules of *procedure*. And, therefore, though a parol contract, within the fourth section of the Statute of Frauds, be made in France, and be valid there, yet that an action on it will not lie in England (*n*).

(*k*) *Smith, ubi sup.*

[(*l*) This section in the Revised Edition of the Statutes is numbered as the 16th.]

(*m*) See following notes as to meaning of these words.

(*n*) *Leroux* v. *Browne*, 12 *Common Bench Rep.* p. 801. It is parcel of the procedure, and not of the formalities of the contract, Mr. Justice Maule observes in this case. [See *Adams* v. *Clutterbuck*, *L. R.* 10 *Q. B. D.* at p. 406, where Cave J. observes that the very language of these provisions of the Statute of Frauds "indicates that it is part of the *lex fori* and not of the *lex loci*."]

The 17th section provides, that "*no contract* for the sale "of any goods, wares, or merchandises for the price of 10*l.* "or upwards *shall be allowed to be good* (*o*), except the buyer "shall accept part of the goods so sold, and actually "receive the same; or give something in earnest to bind "the bargain, or in part of payment; or that some note "or memorandum in writing of the said bargain be made "and signed by the parties to be charged by such contract, "or their agents thereunto lawfully authorised" (*p*).

The intention of the legislature was "to comprehend "within the 4th and 17th sections the subject matter of "every *parol* Contract, an uncertainty in the terms of "which was likely to produce perjury" (*q*).

DCXVI. There is another Statute which, as it had for one of its objects to prevent the evasion of the Statute of Frauds, ought to be mentioned in this place; it cannot be better introduced than in the words of Mr. Smith: "After the 4th section of the Statute of Frauds had ren- "dered verbal guaranties unavailable, it became the "fashion in such cases to bring actions upon the case for "*false* representations, under circumstances in which, be- "fore the Act, the transaction would have been looked on "as one of guaranty. For instance, if A. went to a "tradesman to persuade him to supply goods to B., by "assuring him that he should be paid for them, the "tradesman, in case of B.'s default, could not, it is true, "bring an action of *assumpsit* as upon a warranty, because "there was no written memorandum of what passed; but "he brought an action on the case, in which he accused "A. of having knowingly deceived him as to B.'s ability

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(*o*) See *Reade* v. *Lamb*, 6 *Exchequer Reports*, p. 130, for effect of the words, "*no contract shall be good*," in 17th section, as contrasted with "*no action shall be brought*," in 4th section. This case is at variance with the prior one of *Carrington* v. *Roots*, 2 *Meeson & Welsby's Rep.* p. 248.

[(*p*) See *Addison, Law of Contracts*, ch. ii. s. 2.]

(*q*) *Kent*, ii. p. 494, note (*a*).

" to pay; and if the jury thought this case made out " (as a jury composed of tradesmen were very apt to do), " he " succeeded in his action, and received pretty nearly the " same sum as he would have done if there had been a " guaranty (*qq*)." However, as this was a palpable evasion of the Statute of Frauds, the legislature put an end to it by enacting, in Statute 9 Geo. IV. c. 14, s. 6, commonly called Lord Tenterden's Act, " that no action shall be " brought whereby to charge any person upon or by reason " of any representation or assurance made or given con- " cerning or relating to the character, conduct, credit, " ability, trade, or dealings of any other person, to the in- " tent or purpose that such other person may obtain credit, " money, or goods upon [*sic*], unless such representation " or assurance be made in writing, signed by the party to " be charged therewith " (*r*).

DCXVII. The English Courts of Equity [till their fusion into the Supreme Court of Judicature as already mentioned (*rr*)] exercised a *divisum imperium* upon some subjects with the Courts of Common Law (*s*); thus the subject of *agreements* belonged, in some respects, to either forum.

DCXVIII. The High Court of Admiralty (*t*) [took]

(*qq*) *Smith, Contracts*, Lecture III.

(*r*) For leading cases on the construction of this Statute, see *Lyde* v. *Barnard*, 1 *M. & W. Rep.* p. 101; *Swan* v. *Phillips*, 8 *Adolphus & Ellis Rep.* p. 457; *Devaux* v. *Steinkeller*, 6 *Bingham's New Cases*, p. 84; [*Smith's Leading Cases*, vol. i., notes to *Chandelor* v. *Lopus*.] See also the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3.

[(*rr*) Where Common Law and Equity conflict, Equity now prevails. S. C. J. Act, 1873, s. 25, subs. 11. *Vide sup.* § dcxi. n. (*aa*).]

(*s*) See *Kent*, vol. iv. p. 163, note (*d*); an important note on the variety of customs in the different States of the Union as to the establishment of separate Courts of Equity and Common Law, or blending the powers of both in one tribunal. See also *Story's Comment. on Equity Jurisprudence*, vol. i. c. i. [The Court of Chancery in England is now represented by the Chancery Division of the High Court of Justice, 36 & 37 Vic. c. 66, ss. 16, 31.]

(*t*) The Court of Admiralty of the Cinque Ports, within its limited [local] jurisdiction, [still has cognizance of similar matters].

cognizance of certain maritime contracts. [This Court, also, has been fused into the Supreme Court of Judicature, and is now represented by the Probate, Divorce, and Admiralty Division of the High Court of Justice.]

DCXIX. Whatever practical advantage the French Civil Code may derive from its arrangement of this subject, it cannot be denied that it is open to grave theoretical objections. It reverses the philosophical and proper order of things, by treating, first, of Contract, (*u*) a particular source of Obligation; and, secondly, of Obligation generally. The third title of the third book of the Code is "*Des Con-*" *trats ou des Obligations conventionnelles en général.*" The fourth title of the same book is "*Des Engagements qui se* "*forment sans convention.*" Under the former title the Code lays down the general principles which govern all conventions, whether they have a specific legal title or not; and refers the particular rules of Law which govern particular contracts to the titles under which they are treated, such as Marriage, Sale, Lease, Partnership, Agency; and allots to contracts belonging to *commerce*, technically so called, a particular law with particular rules (*v*).

DCXX. These *Contrats* or *Obligations conventionnelles* assume the following legal designations:

i. *Synallagmatique* or *bilateral*, when the two contracting parties reciprocally bind themselves to each other.

ii. *Commutatif*, when each contracting party engages

[(*u*) A contract is thus defined:—"Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire, ou à ne pas faire quelque chose."—*Code Civil*, art. 1101.]

(*v*) *Code Civil*, liv. iii. tit. iii. art. 1107:—"Les contrats, soit qu'ils aient une dénomination propre, soit qu'ils n'en aient pas, sont soumis à des règles générales, qui sont l'objet du présent titre. Les règles particulières à certains contrats sont établies sous les titres relatifs à chacun d'eux; et les règles particulières aux transactions commerciales sont établies par les lois relatives au commerce."—See *Rogron, Code Napoléon expliqué*, for a clear and concise commentary on these heads (Paris, 1853).

himself to give or do something which is considered as an equivalent for what has been given to or done for it. When the equivalent is contingent upon the uncertain event of gain or loss to the party, the contract is called *aléatoire* (*w*).

iii. *De bienfaisance* is the name of a contract in which one of the parties procures from the other a purely gratuitous advantage (*x*).

iv. *A titre onéreux* is the name of a contract which obliges each of the parties to give or to do something.

DCXXI. Under the title "*Des engagements qui se formment sans convention*" are comprehended the following *obligations*:—

i. Those which are imposed by the *Law, and altogether without the consent* of the individual; such are the obligations which arise from the fact of vicinage between neighbours; such too, according to this Law, is the obligation of accepting the office of Tutor.

This class of obligations is distinguished in principle from—

ii. Those which arise from the *personal acts* of the individual, which acts may be of two kinds, *lawful* or *unlawful*: from the *personal lawful act* flow the obligations (*engagements*) called *quasi-contrats*; from the *unlawful intentional act* termed *délit*, and the *unlawful unintentional act* termed *quasi-délit*, flows the obligation of *repairing the injury* to the individuals, with or without the punishment of the wrongdoer by the State.

[DCXXI.A. The Civil Code of Italy adopts a somewhat different arrangement. The fourth Title of the third Book is "*Delle Obbligazioni e dei Contratti in genere.*" The first

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(*w*) See *Code Civil*, art. 1964.

(*x*) *Rogron* says (note to art. 1105):—"Par exemple, la donation faite sans charges; si elle en était grevée, elle serait *mixte*, c'est-à-dire *à titre onéreux*, jusqu'à concurrence de la valeur des charges, et *de bienfaisance* pour le reste."

chapter of this Title is headed *Delle cause delle obbligazioni*, and begins at once by enumerating as sources of obligation the Law, and the four other sources arising from acts of the individual, viz. *contratto*, *quasi-contratto*, *delitto*, and *quasi-delitto* (*y*). Each of these four is treated of in turn, after which the remaining chapters of the Title deal with the different kinds, the effects, the methods of extinguishing, and the proof, of Obligations (*z*).

The Dutch Civil Code devotes the whole of its third Book to Obligations (*Verbindtenissen*), which are described at the outset as arising always either from agreement or from the Law (*a*).

The Prussian Civil Code treats of contracts more shortly under the head of "Verträge," and interprets "Vertrag" as the mutual consent to the acquisition or alienation of a right (*b*).]

[(*y*) Art. 1097. "Le obbligazioni derivano dalla legge, da contratto o quasi-contratto, da delitto o quasi-delitto."

(*z*) Arts. 1098 to 1377. The definition of Contract is "Il contratto è l' accordo di due o più persone per constituire, regolare, o sciogliere fra loro *un vincolo giuridico*."

(*a*) Boek III., Van Verbindtenissen. Titel i., Van Verbindtenissen in het algemeen. Afdeeling i., Algemeene bepalingen.

Artikel 1269. "Alle verbindtenissen ontstaan of uit overeenkomst, of uit de Wet."

Art. 1270. "Zij strekken om iets te geven, te doen, of niets te doen."

(*b*) Theil I., Titel v., Von Verträgen.

§ 1. "Wechselseitige Einwilligung zur Erwerbung oder Veräusserung eines Rechtes wird Vertrag genannt."]

NOTE TO CHAPTER XXXII.

J. Chitty (Jun.) on Contracts (by Russell, 11th Ed. 1881) pp. 1, 2.

"The term '*Obligation*' is used by the Roman Jurists, and by Pothier in the preliminary article to his treatise on Obligations, as denoting, in its proper and confined sense, *every legal tie* which imposes the necessity of doing or abstaining from doing any act; and as distinguished from *imperfect* obligations, such as charity and gratitude, which impose a general duty, but do not confer any particular right; as well as from *natural* obligations, which, although they have a definite object, and are binding in conscience, cannot be enforced by legal remedy. English lawyers, however, generally use the word *obligation* in a more strict and technical sense, namely, as importing only one particular species of contracts, that is, *Bonds*; and they adopt the term 'Contract' when they wish to convey the more extensive idea of the responsibility which results from the voluntary engagement of one individual to another, as distinguished from that class of liabilities which originates in torts or wrongs unconnected with agreement. In the language of our Law, therefore, the general term *Contract* comprises every description of agreement, obligation, or legal tie, whereby one party binds himself, or becomes bound, expressly or impliedly, to another, to pay a sum of money, or to do, or omit to do, any particular act; whereas the term *Covenant* is properly applied to denote a *contract under seal*; and the term *Agreement* is rarely used except to denote a contract *not* under seal. Whilst the term *Promise* is used to signify any mere parol engagement by one person with another, where there is no consideration for the promise, nor any corresponding duty on the part of him to whom it is made.

"It is not, however, very material to consider what particular meaning is generally attached to these various terms. The essential distinctions between the different kinds of contracts constitute a much more important subject of inquiry. These distinctions are clearly ascertained; and, as they assign to each class of contracts attributes and consequences of the most marked character, they demand our notice before we discuss in detail the proper subject-matter of this work.

"Contracts, or obligations *ex contractu*, are of three descriptions, and they may be classed, with reference to their respective orders or degrees of superiority, as follow:—(1) Contracts of Record, (2) Specialties, (3) Simple Contracts."

CHAPTER XXXIII.

OBLIGATIONS—CONFLICT OF LAWS.

DCXXII. THE foregoing sketch of the leading principles of the Law governing Obligations, adopted by the chief countries of the civilized world, has shown that amid much general similarity there are not unimportant points of difference between them.

We are now led to consider what rules International Comity requires to be adopted in those cases in which one and the same Obligation is, in some of the stages from its inception to its fulfilment, subjected to the jurisdiction of different countries possessing different *municipal* laws upon the subject.

It is proposed to examine the question, first, with respect to THE FORM, and, secondly, with respect to THE SUBSTANCE of an Obligation.

DCXXIII. First, then, we have to inquire which Law, in an apparent or real conflict of laws, should govern THE FORM; and the prosecution of this inquiry will perhaps be best conducted by observing the following order:

1. To consider what are the true principles derived from the Reason of the Thing, having especial regard to the expression of that Reason in the general *usage* of civilized states (*droit coutumier général—allgemeines Gewohnheitsrecht*).

2. What is the doctrine relating to this subject of the Conflict of Laws in the jurisprudence of ancient Rome.

3. What are the express provisions of modern Codes.

4. What are the rules to be deduced from the decisions

of the tribunals in England and the United States of North America.

DCXXIV. The following general observations appear to apply equally to all the foregoing categories:

a. The distinction between the Law applicable to the *form* and that applicable to the *substance* of the Obligation is recognized in all these categories.

β. The distinction between obligations *juris gentium* and *juris privati* is recognized in all these categories.

γ. The conflict of laws may ensue from two causes, either from a collision between different laws on the same subject in the same territory, or from the collision of different laws in different territories, on the same subject (*a*). In the first instance, the conflict arises from the change of the law itself, as where a later abrogates or repeals an earlier law. In the second instance, the conflict arises from a change in the condition of the facts or the person, by which they fall under the dominion of different laws.

DCXXV. First, then—

What are the true principles derived from the Reason of the Thing, and how has that reason been expressed in the usage of civilized states (*b*)?

The true theory of the subject would seem to require that *the form* of the contract should be regulated by the Law of the place of its fulfilment or execution.

But as in practice it often happens that the place of fulfilment is far removed from the place of the origin of the contract,—as it may be difficult to know and even impossible (*c*) to follow the forms prescribed by the Law of the

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(*a*) *Savigny*, *R. R.* viii. s. 344.

"Örtliche Gränzen der Herrschaft der Rechtsregeln.

"Zeitliche Gränzen der Herrschaft."

(*b*) *Savigny*, *ibid.* s. 381. *Bar*, §§ lxvi. *et seq.*

(*c*) *E.g.* The Prussian Law requires a testament to be made through the intervention of a court of justice. [Were it not, therefore, for the benefit of the rule *locus regit actum*, a Prussian dying in France or England would be forced to die intestate, if he happened]

place of fulfilment in the place of the origin,—the general usage of states, increasing in force ever since the sixteenth century, has almost universally adopted the rule which is expressed by the phrase *locus regit actum* (*d*).

DCXXVI. There are, however, important exceptions to the recognition of this rule.

i. Foreign jurists (*e*) hold that where the *status* of the Person is concerned the rule is inapplicable. The person who is a minor by his domestic Law cannot become a major by the operation of foreign Law, nor a person declared infamous by the former become rehabilitated by the latter.

The rule applies only to the legal form in which the expression or declaration of the will of the party interested shall be couched.

The question of *status* is not under the control of the will of the person interested, but is under the authority of the State of which he is a member.

ii. The legal acts of a person are of a twofold character, and there is an important difference between them.

a. There are legal acts which can be done anywhere and are wholly unconnected with any particular place.

β. There are legal acts which are necessarily connected with a particular place (*f*).

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not to have made his will before he entered into either of those States. [See *Savigny*, *ibid.* ss. 381, 382 (pp. 350 and 365 of edition 1849, Berlin); Prussian Code, Theil I. Tit. xii. §§ 66, 67; and *infrà*, § dcxli., note (*mm*).]

(*d*) *Story*, ss. 260, 261, and the authorities there cited. In *Guepratte* v. *Young*, 4 *De G. & Sm.* p. 217, it is laid down that *locus regit actum* is a canon of general jurisprudence, and must be assumed, in the absence of contrary evidence, to apply to a system of foreign law. [See *Smith's Leading Cases*, vol. i., notes to *Mostyn* v. *Fabrigas*.]

Savigny, *ibid.* s. 381, and note (*c*).

Fœlix, liv. ii. t. i. c. i. ss. 73–85, and the authorities there cited.

P. Voet, *De Stat.* sect. ix. c. ii. § 9.

Cf. *J. Voet*, lib. i. tit. iv. (pars secunda) § 10, ss. 13–15.

(*e*) *Savigny*, *ibid.* s. 381, num. i.

(*f*) An English court has holden that an agreement entered into in France, but intended to be executed in England, being of such a nature

To the former class belong contracts of an ordinary kind, and, in the opinion of foreign jurists, the making of a Testament.

To the latter class belong perhaps the most numerous and most important of those acts which relate to the Right to Things—acts which are so intimately connected with the Things themselves, upon which they operate, as to be necessarily done in the place in which the Things are situated.

Pre-eminent among such acts is that of Tradition [or Delivery]; among them also are many transactions of mere form, such as the act connected with Bankruptcy or Insolvency, termed the Judicial Cession (*cession judiciaire —gerichtliche Auflassung*), Enrolment or Registration of mortgages or deeds, and others of a like character, which can only be duly executed before a particular public functionary and at a particular place.

In these instances, according to the general jurisprudence of States, the *lex rei sitæ* prevails; and it is to be observed that this rule cannot be confined to Immoveable Things, but must be extended sometimes to such as are Moveable, as, for instance, in those cases in which the Tradition of the Thing itself is necessary. "In every dis- "position or contract," Lord Mansfield said, "where the "subject-matter relates *locally* to England, the Law of "England must govern and must have been intended to "govern. Thus, a conveyance or will of land, a mortgage, "a contract concerning stocks, must all be sued upon in "England; and the *local nature* of the thing requires "them to be carried into execution according to the law "here" (*g*).

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that, if entered into in England, it would have been void for Champerty, cannot be executed in England; *Grell* v. *Levy*, 16 *C.B.N.S.* p. 73.

(*g*) *Robinson* v. *Bland*, 2 *Burrow's Rep.* p. 1079; 1 *W. Blackstone, Rep.* p. 259.

Cf. *Donellus, De Jure Civ.* lib. xvii. c. xvii.

DCXXVII. The Roman Law contained no special provisions with respect to contracts affecting immoveable property; but the legislations of many countries require that in these cases the *lex rei sitæ* shall be observed. The Prussian Code does so in express terms (*h*); and according to that Law, inasmuch as all contracts for a value of above fifty thalers must be in writing, it follows by almost necessary implication that all immoveable property in that country can only be transferred by a written instrument (*i*).

The English Law contains a like provision (*j*).

DCXXVIII. The foregoing observations as to the stringency of the rule *locus regit actum* are subject to an important limitation. It frequently happens that the form prescribed by the place in which the act is done is not absolutely necessary, but simply what jurists call *facultative* —that is, at the option of the party to adopt or not, leaving him still the power of adopting the form of the place to which the act really has reference.

The true test whereby to decide whether the character of the *lex loci* be or be not facultative, is to examine whether the object of it be to favour and assist the parties and to facilitate their acts; if so, it is very generally admitted that it is facultative, and leaves it competent to the parties to adopt the form of the place in which the act is to take effect (*k*).

(*h*) *Savigny, ibid.* s. 381, num. iii.

Prussian Code, Theil I. Tit. v. § 115. ["In allen Fällen, wo *unbewegliche* Sachen, deren Eigenthum, Besitz oder Nutzung der Gegenstand eines Vertrages sind, müssen wegen der Form die Gesetze des Ortes, wo die Sache liegt, beobachtet werden."]

(*i*) *Savigny, ibid.* note (*e*). [See the Prussian Code, Theil I. Tit. v. §§ 131, 135; Tit. x. §§ 15–17; Tit. xxi. § 233.]

(*j*) *Vide suprà*, § dcxv., notice of the Statute of Frauds.

(*k*) *Savigny, ibid.* s. 381, and note (*o*).

Rodenburg, De Jure quod oritur ex statutorum vel consuetudinum diversitate, tit. ii. c. iii. § 2.

Fœlix, ss. 83–84.

Wächter, Die Collision, &c., Archiv, Band xxv. 377–380.

Hertius, §§ 10–23 [somewhat doubtful].

Schäffner, § 83, doubtful.

DCXXIX. The proper bearing of this limitation of the rule *locus regit actum* upon Testaments will be considered hereafter: it has been already considered in its relation to Marriages (*l*).

DCXXX. Savigny agrees with those jurists who reject any limitation of the rule *locus regit actum* arising from the circumstance that the act has been done in a foreign country for the purpose of evading the Law of the domicil of the parties, *in fraudem legis*; for instance, for the purpose of avoiding an expensive form, stamped paper, or the like. If this evasion deserve punishment, it should be punished by fine or some penalty of the kind, and not by invalidating the act itself; at all events, it would require a positive law of the State to produce this effect.

The policy of England on this point, with respect to stamps upon Bills of Exchange, made out of the country, but meant to take effect in it, will be considered hereafter (*ll*).

DCXXXI. Secondly—

We have to consider whether the rule *locus regit actum* has its root in the Roman Law, and what are the passages therein which appear to relate to this question of jurisprudence.

An examination of these passages will show that the rule, however wise and expedient, is in reality not to be found in the Roman Law. "It is" (Wächter (*m*) says) "incomprehensible how it could ever have been attempted "to ground such a proposition upon the Roman Law." Savigny [and Fœlix are] of the same opinion. (*n*)

DCXXXII. The passage usually relied upon as proof

(*l*) *Vide suprà*, § ccccxxxviii.

(*ll*) *Vide infrà*, chap. xlii.

(*m*) *Wächter, ubi sup.* Band xxiv. 246.

(*n*) *Savigny, R. R.* viii. s. 382. ["Le droit romain ne contient aucune disposition qui consacrât le principe *locus regit actum.*"—*Fœlix*, liv. i. tit. i. s. 74.]

that the Roman Law contains the rule *locus regit actum* is taken from an opinion of Gaius, in the Digest, upon Evictions, "Si fundus venierit, ex consuetudine ejus regionis, "in quâ negotium gestum est, pro evictione caveri opor-"tet" (*o*); but in this passage Gaius says nothing about the external form of any contract, least of all is he speaking of any compulsory law of the State upon the subject (*p*).

He is speaking not of rules of law, but of certain customs as of facts, and of their consequences in a matter left to the free will of the contracting parties and not restrained by any imperative or necessary law.

The same remark applies to another sentence cited from an opinion of Ulpian in the book "*De diversis regulis juris* "*antiqui*" in the Digest (*q*): "Semper in stipulationibus "et in ceteris contractibus id sequimur quod actum est; aut "si non pareat quid actum est, erit consequens ut id sequa-"mur quod in regione, in quâ actum est, frequentatur. "Quid ergo si neque regionis mos appareat, quia varius "fuit? ad id quod minimum est redigenda summa est."

And also to another passage from an opinion of Papinian cited in the book *De usuris*, &c., in the Digest (*r*): "Cum judicio bonæ fidei disceptatur, arbitrio judicis usurarum modus ex more regionis, ubi contractum est, con-"stituitur;" and here the citation usually, but improperly, stops; for the opinion continues, "*ita tamen ut legi non* "*offendat.*" Here it is quite clear that Papinian is not speaking of a contract made in a *foreign* country, or the words would have been to the effect, that the Law of the foreign country should only be so far applicable as it was not contrary to the Roman Law, which was binding upon the judge.

(*o*) *Dig.* lib. xxi. t. ii. 6.
(*p*) *Fœlix, ubi sup.*
Wächter, ubi sup. Band xxiv. 248.
Savigny, ibid. s. 372; s. 356, num. 6. nn. (*i*), (*k*).
(*q*) *Dig.* lib. l. t. xvii. 34.
(*r*) *Dig.* lib. xxii. t. i. 1.

DCXXXIII. Perhaps the most specious passage in favour of the opinion that the maxim *locus regit actum* is to be found in the Roman Law is the following:—

"Si non speciali privilegio *patriæ tuæ* juris observatio "relaxata est, et testes non in conspectu testatoris testi- "moniorum officio functi sunt; nullo jure testamentum "valet" (*s*).

This was the case of a *testament* made without the observance of the well-known rule of Roman Law, that the witnesses should be in the immediate presence of the testator, "in conspectu testatoris" (*t*).

In answer to a question made by a lady called Patroclia, probably the heiress nominated in the testament, the Emperors Diocletian and Maximian *rescribed* that the testament was null, "si non speciali privilegio (*u*) *patriæ tuæ* juris "observatio relaxata est."

The words *patriæ tuæ* appear at first sight to indicate a collision between different local rights, but on further reflection it is evident that the *patria* of the heiress could not be a circumstance decisive of the case. It is not said *where* the testament was made. It is not improbable that the testator made his testament at his own home, where the heiress was also domiciled. The Rescript therefore does not enforce the application of the *locus regit actum* rule: it simply asserts that in the case of a collision between a particular and a general Law the former must prevail, which, Savigny (*x*) remarks, is an unquestionable proposition.

DCXXXIV. The next passage also relates to a testament. The Emperors Valerian and Gallienus *rescribed*:—

(*s*) *Cod.* lib. vi. t. xxiii. 9.

(*t*) So it is afterwards said in the same book of the Code, "testes ipsos audito nomine hæredis *sub præsentiâ ipsius testatoris* nomen hæredis suis subscriptionibus declarare."—*Cod.* lib. vi. t. xxiii. 30.

(*u*) *Privilegium* here means a particular right granted by an Imperial constitution to the town.

(*x*) *R. R.* viii. s. 382.

"Testamenti tabulas ad hoc tibi a patre datas, ut in "patriam perferantur, affirmans: potes illuc perferre, ut "secundum leges moresque locorum insinuentur; ita scilicet "ut, testibus non præsentibus, adire prius vel pro tribunali, "vel per libellum Rectorem provinciæ procures, ac permit- "tente eo, honestos viros adesse facias, quibus præsentibus "aperiantur, et ab his rursum obsignentur" (*y*).

In this case a father, absent from his domicil, remits before his death his testament to his son, desiring him to take it to the place of that domicil. The Emperors decide by a Rescript that, with respect to the opening of the testament before the Court of the place, the laws and customs of that place shall be observed. Here is no mention of any collision of Laws, but only of the true rule that judicial procedure shall be governed by the *lex loci*.

DCXXXV. The next passage relates to a case of *Emancipation*. The Emperors Diocletian and Maximian *rescribed* to one Herennius, "Si lex municipii, in quo te pater eman- "cipavit, potestatem Duumviris dedit, ut etiam alienigenæ "liberos suos emancipare possint; id quod a patre factum "est suam obtinet firmitatem" (*z*).

A father having emancipated his son before the Duumvirs of a city, in which he was a stranger, the validity of the emancipation was disputed.

The municipal magistrates did not possess the *legis actio* as a general rule, but only by way of special privilege (*a*), and hence the doubt in this case.

The Emperors laid down the law that the validity of the act depended upon the provisions of the Law of the city. If that conferred on the Duumvirs the *legis actio* with power to exercise it even with regard to strangers, the transaction was valid. Most truly does Savigny say that there is not the faintest trace in this case of any collision of local Laws (*aa*).

(*y*) *Cod.* lib. vi. t. xxxii. 2.
(*z*) *Cod.* lib. viii. t. xlix. 1.
(*a*) *Savigny, Geschichte des R. R. im Mittelalter*, Kap. ii. § 27.
(*aa*) *Savigny, System des R. R.* viii. s. 382.]

DCXXXVI. It remains to notice a passage sometimes cited for the same purpose from the Canon Law.

"De Franciâ quidam nobilem mulierem de Saxoniâ "lege Saxonum duxit in uxorem; verùm quia non eisdem "utuntur legibus Saxones et Francigenæ, causatus est quòd "eam non suâ, id est, Francorum lege desponsaverat (vel "acceperat, vel donaverat), dimissâque illâ, aliam super- "duxit. Definivit super hoc sancta Synodus, ut ille trans- "gressor Evangelicæ legis subjiciatur pœnitentiæ, et a "secundâ conjuge separetur, et ad priorem redire coga- tur" (*b*).

From this passage it would appear that a Frenchman had married a Saxon woman, and in so doing had followed not the French but the Saxon Law. Having lived with her many years and had children by her, he had recourse to the flaw in the mode of contracting the marriage, repudiated her, and married another wife. An assembly of the church pronounced this proceeding culpable, annulled the second and declared valid the first marriage.

Here again, Savigny remarks, is no mention of the collision of local laws; indeed, the place in which the contract was entered into is not mentioned. The decision is founded upon the doctrine of the Canon Law, which held the first marriage to be binding and indissoluble, and that the observance of this or that custom of the Civil Law was a circumstance of no significance as far as the validity of the bond was concerned (*bb*).

DCXXXVII. Whatever therefore may be the soundness and value of the rule *locus regit actum*, it derives no direct authority from any passage in the Roman or the Canon Law, which are the foundations of all Christian Law.

How this rule came to be discussed by the *Glossatores*, and first adopted by Bartolus in the matter of Testaments, [is considered at length by Fœlix (*c*).]

(*b*) X. lib. iv. 1. 1.

[(*bb*) *Savigny*, *R. R.* viii. s. 382.]

(*c*) Liv. ii. tit. i. s. 74. [See also *Bar*, §§ 4, 34.]

DCXXXVIII. Thirdly—

We have to consider whether and to what extent the modern Codes of Christian States have expressly incorporated, among their provisions, the rule *locus regit actum* (*d*).

DCXXXIX. As to the French Law on this subject. It had been proposed by the French Government to introduce into the Code the following provision: "La forme des actes "est réglée par les lois du lieu dans lequel ils sont faits ou "passés." But it was urged that this provision was unnecessary for acts done in France; as, since the Revolution, there was one and the same form throughout the kingdom, and that if it were intended for acts done out of the kingdom, it was *ultra vires* of the French legislation; that therefore it must be confined to acts done by Frenchmen in a foreign state, and that upon this hypothesis the proposed article was couched in too general terms; for instance, it might be holden as operating to validate the marriage of a French minor, in a state governed by the Law of the Council of Trent, to which he had resorted for the express purpose of marrying without the paternal consent.

In consequence of these considerations the French Government omitted this article. Nevertheless, Merlin observes the *Conseil d'Etat* considered the rule *locus regit actum* to be one of those notorious rules which do not require the express sanction of the legislature (*e*). The recognition of the rule is implied in articles 47 and 999 (*f*)

(*d*) *Fœlix*, *ibid.* s. 85, et seq.
Savigny, *R. R.* viii. s. 382.

(*e*) *Merlin*, *Rép.* Loi, VI. ss. 7, 8.

(*f*) Art. 47. "Tout acte de l'état civil des Français et des étrangers, fait en pays étranger, fera foi, s'il a été rédigé dans les *formes usitées dans ledit pays.*"

Art. 999. "Un Français, qui se trouvera en pays étranger, pourra faire ses dispositions testamentaires par acte sous signature privée, ainsi qu'il est prescrit en l'article 970, ou par acte authentique, avec les formes usitées dans *le lieu où cet acte sera passé.*"

Art. 1317. "L'acte authentique est celui qui a été reçu par officiers publics ayant le droit d'instrumenter *dans le lieu* où l'acte a été rédigé, et avec les *solennités* requises."

of the Code, and also, according to Fœlix (*g*), in article 170 (*h*).

[The Belgian Civil Code merely follows the French.]

DCXL. The rule *locus regit actum* was the rule which anciently, and previously to the compilation and promulgation of codes, obtained throughout all the German States (*i*).

DCXLI. The Prussian Code does not contain any recognition of *locus regit actum* as a general principle.

The 33rd (*j*) article [of the Introduction] might appear to derogate from it, but Savigny (*k*) points out that this article does not say that it is incompetent to strangers to use a form prescribed by a particular statute, or that an act adopting such a form would not be valid, but that only native subjects, and not foreigners, are bound to adopt this form.

In all matters of Contract (*l*) the Prussian Code expressly

(*g*) *Fœlix, ubi sup.* s. 85.

(*h*) In the words, "S'il a été célébré dans les formes usitées dans le pays." Art. 170.

(*i*) "Die uralte in ganz Deutschland von jeher geltende Regel *locus regit actum*, die also dadurch von Seiten unserer Gesetzgebung die unzweifelhafteste Anerkennung erhält."—*Savigny, R. R.* viii. s. 382.

[(*j*) Prussian Code. *Einleitung.*

§ 33. "Provincialgesetze und Statuten, welche die äusserliche Feierlichkeit einer Handlung bestimmen, gelten nur bei Handlungen, die unter der Gerichtsbarkeit, für welche das Gesetz gegeben ist, von den ihr unterworfenen Personen vorgenommen werden."

§ 34. "Auch Unterthanen fremder Staaten, welche in hiesigen Landen leben, oder Geschäfte treiben, müssen nach obigen Bestimmungen beurtheilt werden."

§ 35. "Doch wird ein Fremder, der in hiesigen Landen Verträge über daselbst befindliche Sachen schliesst, in Ansehung seiner Fähigkeit zu handeln, nach denjenigen Gesetzen beurtheilt, nach welchen die Handlung am besten bestehen kann."]

(*k*) *R. R. ibid.* and note (*i*).

[(*l*) Prussian Code, Theil I. Tit. v. § 111. "Die Form eines Vertrages ist nach den Gesetzen des Ortes, wo er geschlossen worden, zu beurtheilen."

Et vide §§ 112-114.]

recognizes the rule for *moveable* property, but for *immoveable* property it exclusively applies the *lex rei sitæ* (*m*).

It may be observed here in passing that this Code is silent as to the form of Testaments made abroad (*mm*).

DCXLII. The Austrian Code does not contain in its text any express recognition of the rule, in those articles (*n*)

(*m*) Prussian Code, *ubi sup.* § 115. [*Vide suprà*, § dcxxvii. note (*h*).]

[(*mm*) Wills may be made at sea (Prussian Code, Th. I. Tit. xii. § 205), or by Prussians abroad in the diplomatic (Law of 3 April, 1823) or military (Law of 8 June, 1860) services.]

[(*n*) Austrian Code (Das allgemeine bürgerliche Gesetzbuch für das Kaiserthum Oesterreich).

§ 4. "Die bürgerlichen Gesetze verbinden alle Staatsbürger der Länder, für welche sie kundgemacht worden sind. Die Staatsbürger bleiben auch in Handlungen und Geschäften, die sie ausser dem Staatsgebiete vornehmen, an diese Gesetze gebunden, in so weit als ihre persönliche Fähigkeit, sie zu unternehmen, dadurch eingeschränket wird, und als diese Handlungen und Geschäfte zugleich in diesen Ländern rechtliche Folgen hervorbringen sollen. Inwiefern die Fremden an diese Gesetze gebunden sind, wird in dem folgenden Hauptstücke bestimmt."

§ 33. "Die Fremden kommen überhaupt gleiche bürgerliche Rechte und Verbindlichkeiten mit den Eingebornen zu, wenn nicht zu dem Genusse dieser Rechte ausdrücklich die Eigenschaft eines Staatsbürgers erfordert wird. Auch müssen die Fremden, um gleiches Recht mit den Eingebornen zu geniessen, in zweifelhaften Fällen beweisen, dass der Staat, dem sie angehören, die hierländigen Staatsbürger in Rücksicht des Rechtes, wovon die Frage ist, ebenfalls wie die seinigen behandle."

§ 34. "Die persönliche Fähigkeit der Fremden zu Rechtsgeschäften ist insgemein nach den Gesetzen des Ortes, denen der Fremde vermöge seines Wohnsitzes, oder, wenn er keinen eigentlichen Wohnsitz hat, vermöge seiner Geburt als Untherthan, unterliegt, zu beurteilen; insofern nicht für einzelne Fälle in dem Gesetze etwas anderes verordnet ist."

§ 35. "Ein von einem Ausländer in diesem Staate unternommenes Geschäft, wodurch er Anderen Rechte gewähret, ohne dieselben gegenseitig zu verpflichten, ist entweder nach diesem Gesetzbuche, oder aber nach dem Gesetze, dem der Fremde als Unterthan unterliegt, zu beurteilen; je nachdem das eine oder das andere Gesetz die Giltigkeit des Geschäftes am Meisten begünstiget."

§ 36. "Wenn ein Ausländer hierlandes ein wechselseitig verbindendes Geschäft mit einem Staatsbürger eingeht, so wird es ohne

in which it speaks of engagements contracted and conventions entered into by strangers either in Austria or abroad, applying to them sometimes the Austrian and sometimes the Foreign Law; it does not clearly specify whether the application of these laws relates to the *substance* or the *form* of the act, but it is the opinion of competent judges that these articles relate to both (*o*).

DCXLIII. Bavaria (*p*), Wurtemberg (*q*), Baden (*r*), applied the rule; Wurtemberg with the qualification, however, that the *form* adopted were not specially prohibited, either by the law of the State in which the act was done, or by that of the State in which it was to be enforced (*s*).

The Code of the Netherlands contains a general recognition of the rule (*t*).

DCXLIV. By the present Italian Code the form of all acts, including wills, is determined by the law of the place where they are done. But testators and contracting parties (if all the parties are of the same nation) may adopt the forms of their national Law (*z*).

Ausnahme nach diesem Gesetzbuche; dafern er es aber mit einem Ausländer schliesst, nur dann nach demselben beurteilet, wenn nicht bewiesen wird, dass bei der Abschliessung auf ein anderes Recht Bedacht genommen worden sei."

§ 37. "Wenn Ausländer mit Ausländern, oder mit Unterthanen dieses Staates in Auslande Rechtsgeschäfte vornehmen, so sind sie nach den Gesetzen des Ortes, wo das Geschäft abgeschlossen worden, zu beurteilen; dafern bei der Abschliessung nicht offenbar ein anderes Recht zum Grunde gelegt worden ist, und die oben im § 4 enthaltene Vorschrift nicht entgegen steht."]

(*o*) *Fœlix, ubi sup.* s. 85, citing *Winiwarter's* Commentary.

(*p*) Theil I. Kap. ii. § 17.

(*q*) Art. 22 [of a treaty between Baden and Wurtemberg, A.D. 1825].

(*r*) Art. 3 [of Civil Code of Baden].

(*s*) *Fœlix, ibid.*

(*t*) [Dutch Civil Code. Preliminary Law (*Wet houdende algemeene bepalingen*), art. 10.

"De vorm van alle handelingen wordt beoordeeld naar de wetten van het land of de plaats, alwaar de handelingen zijn verrigt."]

(*z*) Codice Civile. Disp. Art. 9. ["Le forme estrinseche degli atti

DCXLV. As to the Swiss Cantons, [Fœlix observes that the Code of the Canton of Vaud (*a*), whilst silent as to the general principle, reproduced arts. 47, 170, 970, and 999 of the French Code (which take for granted the existence of the Rule); and that] the Cantons of Berne and Fribourg contained no express enactment on the subject, which, however, was to be found in the Code of the Canton of Lucerne (*b*).

DCXLVI. The Russian Digest of Laws contained an enactment to the effect that acts done in a foreign state conformably to the Law of that State, although not conformably to the form prescribed by the Law of Russia, should be admitted as evidence of the act having been rightly executed, until it was impugned by contrary proof (*c*).

DCXLVII. The Civil Code of Louisiana (*d*) enacts that the "*form and effect* of public [and private written instru- " ments are governed by the laws and usages of the places " where they are passed or executed. But the effect of acts " passed in one country, to have effect in another country, is " regulated by the laws of the country where they are to " have effect (*e*)."]

DCXLVIII. Fourthly—

It remains to consider the decisions on this subject in the tribunals of England and the United States of North America.

There is no doubt that the tribunals of both these States

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tra vivi e di ultima volontà, sono determinate dalla legge del luogo in cui sono fatti. E però in facoltà dei disponenti o contraenti di seguire le forme della loro legge nazionale, purchè questa sia comune a tutte le parti."]

(*a*) *Fœlix, ubi sup.* s. 85.

(*b*) Art. 6: " La forme des actes est réglée par la loi du pays où ils ont été faits." [Cf. *suprà*, § dcxxxix.]

Fœlix, ibid.

(*c*) *Fœlix, ibid.*

(*d*) Preliminary Title. Article 10.

(*e*) *Fœlix, ibid.*

have promulgated, in the most decided and positive terms, the maxim *locus regit actum* as to all acts of Obligation or Contract.

No act of this kind executed in a foreign country is holden valid by the tribunals of either of these States unless executed according to the formalities prescribed by the Law of that foreign country (*f*).

Indeed, the maxim is considered by these tribunals to apply, not only to the external form, but, as will be hereafter noticed, to the *internal substance* of the act of obligation.

(*f*) *Story*, ss. 242, 242(*a*), 243. ["Generally speaking," says Story, "the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for, as we shall presently see, in the latter case, the law of the place of performance is to govern. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere, by the tacit or implied consent of the parties. The rule is founded, not merely in the convenience, but in the necessities of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation."—s. 242.]

The English leading cases are *Trimby* v. *Vignier*, 1 *Bingham's New Cases*, p. 151.

Don v. *Lippmann*, 5 *Clark & Finnelly's Rep.* p. 1.

De la Vega v. *Vianna*, 1 *Barnewall & Adol. Rep.* p. 284.

British Linen Company v. *Drummond*, 10 *Barnewall & Cres. Rep.* p. 903.

[In *Adams* v. *Clutterbuck*, *L. R.* 10 *Q. B. D.* p. 403, one Englishman granted to another, by a writing not under seal, certain sporting rights over land in Scotland. The writing, which was signed in England, was effectual according to Scottish Law, but according to English Law was invalid as being a grant of an incorporeal hereditament not made by deed. Cave J. decided that the rule of English Law invalidating the grant was *not* part of the *lex fori*, and that the grant, being good in Scotland, must be upheld in the English Court.

See *Chamberlain* v. *Napier*, *L. R.* 15 *Ch. D.* p. 614; *Studd* v. *Cook*, *L. R.* 8 *App. Ca.* p. 577; *Cooper* v. *Cooper*, *L. R.* 13 *App. Ca.* p. 88; *Williams* v. *Colonial Bank*, *L. R.* 38 *Ch. D.* p. 388; and *Burchard* v. *Dunbar*, decided in the Supreme Court of Illinois, *American Reports by Isaac G. Thompson*, vol. xxv. p. 334.]

And this may be the reason why the distinction between the application of the rule to the form and its application to the substance is, perhaps, not very clearly taken in Story's elaborate work.

The application of the Rule to the Contract of marriage has already been noticed (*g*).

[(*g*) *Suprà*, chapters xviii. xix.]

CHAPTER XXXIV.

OBLIGATIONS—SUBSTANCE—REASON OF THE THING.

DCXLIX. We have now to consider the Law which, in a real or apparent conflict of laws, should govern an obligation as to The Substance (*a*).

DCL. In the prosecution of this inquiry it is proposed to observe the same order as has already been observed with respect to the form of an obligation.

First, then —

What are the true principles derived from *the Reason of the Thing*? Obligations, like other Rights to Things, must appertain to a definite place. With respect to that Right to Things, as we have seen (*b*), the person is taken out of his abstract individuality and brought within the domain of a local Law governing his right.

What is this place? What is, to borrow the expression of Savigny (*c*), *the seat of the obligation* [(*der wahre Sitz*)]?

The answer as to the peculiar class of rights termed Obligations has a peculiar difficulty. The object of other Rights is material and sensible; but the object of an Obligation is, comparatively speaking, incorporeal and invisible, and we must begin by giving a body to it, in order to answer the question. We are enabled to give this visible body to the obligation by considering its nature and its outward appearance or development.

Now, every obligation (1) arises out of visible facts, and

(*a*) *Savigny, R. R.* viii. ss. 369–370.
(*b*) *Vide antè*, chapters xxviii. and xxxiii.
(*c*) *Savigny, ibid.* s. 369.

(2) must be fulfilled through the medium of visible facts: and both classes of these facts must happen in a particular place.

Is the former or the latter place—or, in other words, is (i) the place where the obligation is entered into, or (ii) the place where it is to be fulfilled—the true seat of the obligation (*d*)?

DCLI. (i) The reasons against considering *the place of the origin of the obligation* to be *the seat* of it appear to be, that this place is accidental, of a transitory character, and unconnected with the actual development and practical working of the obligation.

(ii) The principal reason for considering *the place of the fulfilment of the obligation* to be the seat of it appears to be, that this place is intimately connected with the essence of the obligation; for the essence consists in this, that something which previously to the obligation was uncertain and was within the competence of the obligor to do or not to do, has since the obligation become certain and necessarily binding on him (*e*).

Now, this certainty and necessity constitute the fulfilment of the obligation. The place in which this certainty and necessity can be reduced to practice is the place which the parties to the obligation have had in view, for it is the place of the fulfilment. This place must be identical with the proper *forum*, to the adjudication of which the obligation is naturally and by the free will of both the parties made subject (*f*). But though the seat of the obligation and this

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(*d*) "*Factorum genera*, unde obligatio oritur, sunt illa, quæ ante commemoravi, quatuor; contractus, quasi contractus, maleficium, quasi maleficium." — *Donellus, Comment. de Jure Civ.* lib. xvii. c. xiv. 5.

Donellus, lib. xvii. c. xvii., well deserves the most careful study on this subject.

(*e*) The obligations of *do ut des*, *facio ut facias*, &c., are, in truth, *double* obligations, and do not impugn the position in the text.

(*f*) "Jure communi omnino quatuor res sunt quæ eos, qui ex

jurisdiction to which it is naturally subject are in truth one, this remark nevertheless does not apply to an accidental *forum*, or even to the *forum domicilii* of the defendant, which, according to the opinion of the best jurists, may be always resorted to by the plaintiff (*g*).

Many of the earlier writers were of opinion that the place of jurisdiction was identical with the place of the origin of the obligation; an error which, as Savigny remarks, arose from confounding all obligations with contracts, and led them to use the expression *forum contractûs*—an expression unsatisfactory and unscientific, however generally adopted, and one that originated in a misapprehension of a passage, which will presently be noticed, in the Roman Law.

It is to be observed, however, that even these writers admit so many exceptions to their rule as practically to destroy it. Modern writers, on the contrary, usually abandon this rule, and in lieu of it identify the place of jurisdiction with the place of the fulfilment; and rightly, if this latter be correctly determined.

It is to be always remembered that in obligations it is the will of the contracting parties and not the Law which fixes the place of the fulfilment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves. This jurisdiction, again, is intimately connected with the particular Law which is to be applied to govern the obligation.

DCLII. The question, therefore, as to what is *the seat of*

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personâ suâ conveniuntur, jurisdictioni ejus apud quem agitur subjiciunt. . . . Domicilium litigatoris in territorio judicis constitutum—Obligatio, quâ de agitur, ibi contracta—Res ita sita de cujus proprietate aut possessione agitur—Judicium ibi apud eum judicem cœptum."—*Donellus*, lib. xvii. c. xii. 1. "Est enim *convenire* aliquem, coram appellare, cum præsente agere de re aliquâ, qui nobis de eâ re respondeat: ut præsens quidem dicatur *conveniri*, absens autem per præsentem defendi." Lib. xvii. c. xi. 3.

(*g*) *Savigny, R. R.* viii. s. 355, num. ii.; s. 370; s. 372.

an obligation, is one of theory only, but nevertheless the consideration of it assists the answer to the two practical questions—viz.,

i. To what *jurisdiction* is each obligation subject?

ii. What *local Law* is applicable to it?

As, generally speaking, these two coincide, the same answer applies to both.

According to Savigny (*h*), that jurisdiction and that local Law are to be found—

(1) In the place where the will of the parties has fixed the fulfilment of the obligation, whether this will be directly expressed, or be necessarily deducible from the nature of the acts which accompany the obligation.

(2) In default of any place so fixed, then in the place where the obligor carries on the business which gave rise to the obligation.

(3) In the place of the origin of the obligation, when it happens to be identical with the domicil of the obligor.

(4) In the place of the origin of the obligation, though it be not the domicil of the obligor, if the circumstances show that this is the place of the fulfilment contemplated by the parties.

(5) In all other cases in the domicil of the obligor.

DCLIII. Though the place of special jurisdiction and the local Law of the obligation thus generally coincide, there is one important difference between them.

The plaintiff or obligee may always elect at his pleasure the *forum* either of the special jurisdiction, or of the general, viz. that of the domicil of the defendant or obligor. But the plaintiff or obligee alone cannot abandon at his pleasure the local Law applicable to the obligation, that being always exclusively determined either by a specified place of fulfilment, or in default of that by the place of the origin of the obligation, or by the domicil of the obligor according to the circumstances of each case.

(*h*) *Savigny, ubi sup.* ss. 370, 372.

DCLIV. As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local Law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular Law, though legal by another. The parties cannot be presumed to have contemplated a Law which would defeat their engagements. Nor is it to be understood that these rules as to the seat and the local Law of obligations, though generally applicable, can be without exception applied to every possible question of legal right arising out of an obligation.

This is a subject which requires a profound and comprehensive study of the different kinds of obligation and of the different questions of legal right arising from them (*i*).

DCLV. Secondly—

As to the doctrine relating to this subject to be collected from the Roman Law.

This question again subdivides itself into two inquiries:

1. What is the general doctrine of the Roman Law as to the true place or *seat* of the obligation?

2. What is the doctrine of the Roman Law relative to a *conflict of laws* of different states upon this matter?

1. With respect to the general doctrine of the Roman Law as to the true place or seat of the obligation (*k*).

The true rule of the Roman Law appears to be, that, if the place of fulfilment be not determined by the express words of the Contract, the debtor must fulfil his obligation wheresoever he is sued, *ubi petitur*; so that the place of fulfilment would depend, according to this Law, upon the option of the creditor. He might choose the *forum originis* or the *forum domicilii*; and the debtor might have various *domicilia*, each sufficient at least to found a jurisdiction

(*i*) *Savigny, ubi sup.* ss. 372, 374.
(*k*) *Ibid.* s. 370.

for this purpose. According to the Roman Law, therefore, the *place of fulfilment* would not determine the *place of jurisdiction*, but would be determined by it (*l*). The leading passages which prove that such is the principle of the Roman Law are the following, taken:—

a. From the title, "De annuis legatis et fideicommissis" (*m*).

"Cum in annos singulos quid legatum sit, neque ascriptum, quo loco detur; *quocunque loco petetur, dari debet*; sicuti ex stipulatu, aut nomine facto petatur."

β. From the title, "De judiciis et ubi quisque agere vel conveniri debeat" (*n*).

"Quod legatur, siquidem per personalem actionem exigetur, *ibi dari debet, ubi est*; nisi dolo malo hæredis subductum fuerit; tunc enim ibi dari debet, *ubi petitur*. Præterea quod pondere, aut numero, aut mensurâ continetur, ibi dari debet, ubi petitur; nisi adjectum fuerit, *Centum modios ex illo horreo*, aut *vini amphoras ex illo dolio*." The passage continues, with a limitation indeed, to be presently more fully noticed—"Si autem per in rem actionem legatum petetur, etiam ibi peti debet, ubi res est. Et, si mobilis sit res, ad exhibendum agi cum hærede poterit, ut exhibeat rem, sic enim vindicari a legatario poterit."

γ. From the title, "De legatis et fideicommissis" (*o*).

"Cum res legata est, si quidem propria fuit testatoris, et copiam ejus habeat hæres, moram facere non debet, sed eam præstare. *Sed si res alibi sit, quam ubi petitur, primum quidem constat, ibi esse præstandam, ubi relicta est*, nisi alibi testator voluerit; nam si alibi voluit, ibi

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(*l*) Thereby, in Savigny's opinion, reversing the true order of things:

"So wird also durch jene Lehre das wahre Sachverhältniss geradezu umgekehrt."—*Ubi sup.* s. 370.

(*m*) *Dig.* lib. xxxiii. t. i. 1.

(*n*) *Ib.* lib. v. t. i. 38.

(*o*) *Ib.* lib. xxx. t. i. 47.

" præstanda est, ubi testator voluit, vel ubi verisimile est " eum voluisse. Et ita Julianus scripsit tam in propriis, " quam in alienis legatis. Sed si alibi relicta est, alibi " autem ab hærede translata est dolo malo ejus, nisi ibi " præstetur, ubi petitur, hæres condemnabitur doli sui " nomine; ceterùm si sine dolo, ibi præstabitur, quo trans- " tulit. Sed si id petatur, quod pondere, numero, mensurâ " continetur, si quidem certum corpus legatum est, (veluti " frumentum ex illo horreo, vel vinum ex apothecâ illâ,) " ibi præstabitur, ubi relictum est; nisi alia mens fuerit " testantis. Sin vero non fuit certa species, ibi erit " præstandum, ubi petitur."

δ. From the title, " De condictione triticariâ " (*p*).

" Si merx aliqua, quæ certo die dari debebat, petita " sit, veluti vinum, oleum, frumentum, tanti litem æstiman- " dam, Cassius ait, quanti fuisset eo die, quo dari debuit; " si de die nihil convenit, quanti tunc, quum judicium " acciperetur. Idemque juris in loco esse, ut primum " æstimatio sumatur ejus loci, quo dari debuit; *si de loco* " *nihil convenit, is locus spectetur, quo peteretur. Quod et de* " *ceteris rebus juris est.*"

ε. From the title, " De rebus creditis " (*q*).

" Vinum quod mutuum datum erat, per judicem " petitum est: quæsitum est, cujus temporis æstimatio " fieret, utrum quum datum esset, an quum lis contestata " fuisset, an quum res judicaretur? Sabinus respondit: " si dictum esset, quo tempore redderetur, quanti tunc " fuisset; si non, quanti tunc quum petitum esset. In- " terrogatus, cujus loci pretium sequi oporteat? Re- " spondit: *si convenisset, ut certo loco redderetur, quanti eo* " *loco esset; si dictum non esset, quanti, ubi esset petitum.*"

DCLVI. 2. We have next to consider what is the doctrine of the Roman Law, relative to the application of

(*p*) *Dig.* lib. xiii. t. iii. 4.
Cf. *antè*, vol. i. § lix.
(*q*) *Dig.* lib. xii. t. i. 22.

a particular local Law in the event of a conflict of laws of different states, upon the subject of the true place or seat of an obligation (*r*).

And the consideration need not occupy us longer than Pontoppidan's celebrated chapter which is headed "On "Snakes in Norway:" "There are no snakes in Norway."

There are no direct and positive rules on this subject of the conflict of laws in the Roman Law (*s*), therefore the theory *of the place of the jurisdiction of the obligation*, which has been just considered, is of the more importance as supplying the answer to the question, What *local Law* is to be applied to govern the obligation?

Savigny strongly insists upon this to prove that the intimate connexion between the place of jurisdiction and the application of the local Law, is not only well founded in theory, but fruitful of practical advantages; for he argues that the same presumption as to the voluntary submission of the obligor, when he incurs the obligation, which founds both the *seat* and the *jurisdiction* of the obligation, ought equally to determine what is the local Law applicable to the obligation, and thus, that when you have fixed the place of fulfilment you have at the same time fixed the local Law.

The rules therefore, as has been stated, which determine the former, may be reproduced to determine the latter consideration. The local Law which is to govern the obligation, therefore, is to be found—

(1.) If there be a place fixed for the fulfilment of the obligation, then in that place.

(*r*) "Certi juris est, neminem judicem mittere posse actorem in possessionem eorum bonorum, quæ ejus territorio subjecta non sunt." *Donellus, De Jure Civ.* lib. xvii. c. xiv. 13.

(*s*) " . . . für welche Frage es an quellenmässigen Bestimmungen des Römischen Rechts eigentlich ganz fehlt."—*Savigny, ubi sup.* s. 372.

See some isolated instances collected by the usual industry and commented upon with the usual acumen of the same author, *ib.* s. 356.

(2.) If the obligation be connected with a business continuously carried on by the obligors, then in the place where the carrying on of that business is permanently fixed.

(3.) If the obligation arise from a single act of the obligor done at his own domicil, then in the place where that act has been done; and no subsequent change of domicil at all affects the question.

(4.) If the obligation arise from a single act of the obligor done away from his domicil, but in a place which the circumstances show to have been intended as the place of fulfilment, then in that place.

(5.) In the absence of all these predicaments, then in the domicil of the obligor.

DCLVII. It has been said that the Roman Law furnishes no direct and positive rules as to which Law, in the event of a conflict of laws, shall govern the obligation (*t*).

It is proper, however, in this place to notice again those passages from the Roman Law, which some writers have erroneously relied upon as furnishing such direct and positive rules, but which may be cited as indirectly bearing upon the subject.

"Semper in stipulationibus et in ceteris contractibus id "sequimur quod actum est; aut si non pareat quid actum "est, erit consequens ut id sequamur quod in regione, in "quâ actum est, *frequentatur*" (*u*).

"Si fundus venierit, ex *consuetudine* ejus regionis, in quâ "negotium gestum est, pro evictione caveri oportet" (*x*).

In the first place, it is to be observed that these passages refer to local *customs*, and not to local Laws.

(*t*) *Savigny, R. R.* viii. ss. 356, 372. [*Vide suprà*, §§ dcxxxii, dclvi.]

Fœlix says that the passages hereafter referred to were rules adopted in case of conflict between different "*usages*" of the Roman Empire: "Ces décisions peuvent indubitablement être invoquées aujourd'hui comme raison écrite."—Liv. ii. tit. i. c. ii. s. 96.

(*u*) *Dig.* lib. l. t. xvii. 34.

(*x*) *Dig.* lib. xxi. t. ii. 6.

In the second place, their object is to furnish a rule of *interpretation* (*y*) for a Contract; for instance, that it shall be presumed, unless the contrary appear, that the parties to a contract intended to conform to the *usage* of the country in which it was made. With respect to the second citation, it may be also a presumption that the parties to the contract intended to submit themselves to the Law of a specific *place*: the words *ejus regionis in quâ negotium gestum est* exclude, Savigny observes, some other region or place. But what place? He concludes that both the parties to the contract were domiciled in the *same* place—in that place there prevailed a particular usage different from the ordinary usage, with respect to evictions, and the jurisconsult decided that the price to be paid under the eviction must be estimated not according to the general usage, which is excluded, but according to the particular usage of the particular place.

This construction of the foregoing passage in the Digest is to be borne in mind in considering two further passages usually cited upon this subject, viz.:

"Venire bona ibi oportet, ubi quisque defendi debet, id "est—Ubi domicilium habet—Aut ubi quisque contraxit. "Contractum autem non utique eo loco intelligitur, quo "negotium gestum sit, sed quo solvenda est pecunia" (*z*).

"Contraxisse unusquisque in eo loco intelligitur, in quo, "ut solveret, se obligavit" (*a*).

The last of these passages speaks of the jurisdiction, not of the local Law: the former passage is so loosely worded that it may refer to either. It has been seen that Savigny maintains that the jurisdiction and the local Law are inseparably united.

(*y*) The same remark applies to this passage: "Ea enim quæ sunt moris et consuetudinis in bonæ fidei judiciis debent venire."—*Dig.* lib. xxi. t. i. 31, § 20.

(*z*) *Dig.* lib. xlii. t. v. 1, 2, 3.

(*a*) *Dig.* lib. xliv. t. vii. 21.

DCLVIII. Thirdly—

We have to consider what are the express provisions of Modern Codes upon this subject.

The Prussian Code (*b*) contains provisions having for their object to ensure an equality of rights between Foreigners and Native subjects in their dealings with each other. This is the general principle of this code; the exceptional departures (*c*) from it have, Savigny assures us, their origin in the benevolent intention of protecting legal acts of foreigners from consequences of nullity, which might result from the collision of local Prussian laws; and not in the intention of subjecting foreigners to the exclusive authority of Prussian Law.

The same author remarks, that the doctrine respecting personal and real statutes which prevailed at the time of the compilation of the code, has exercised a great influence upon the provisions relating to foreigners, and that to the imperfections of this doctrine are chiefly to be ascribed certain doubts and difficulties in the application of the principle to the Law of succession and inheritance.

DCLIX. The Austrian Code (*d*) is very similar to the Prussian upon this subject. It recognizes the equality of rights between the foreigner and native subject; and contains, like the Prussian Code, certain provisions for the purpose of preventing contracts and agreements between them from being invalidated by local ordinances.

DCLX. The French Code (*e*) contains but few provisions relative to the collision of domestic and foreign Laws. But the principle of an equality between foreigners and native subjects, as to the acquirement and enjoyment of civil rights, is distinctly asserted therein.

(*b*) *Savigny, ubi sup.* s. 382.

Wächter, Die Collision, &c., Archiv, Band xxiv. 236 et seq.

Prussian Code, *Einleitung*, §§ 23–35; compare § 34 with § 23.

(*c*) *Ibid.* §§ 27, 35.

(*d*) Austrian Civil Code, §§ 4, 33–37 [cited *in extenso*, *suprà*, § dcxlii. note (*n*)].

(*e*) *Code Civil*, Arts. 11 16, [" De la jouissance des droits civils."]

DCLXI. Though the French Code is silent on the subject, it has been expounded by French jurists, such as Merlin, Massé, and Fœlix, in a manner worthy of a country to which the science of Law is so largely indebted. Fœlix (*f*) thus lays down the general Law on this subject, in accordance with Merlin and with the decisions of the French tribunals: "Le principe général en cette matière est que les "parties contractantes ont eu l'intention de se conformer, "dans leurs conventions, à la loi du lieu où celles-ci ont été "consenties et sont devenues parfaites, et, par suite, de les "soumettre à cette loi; en d'autres termes, que *la valeur* "*intrinsèque, la substance, le lien* (vinculum juris) des con-"ventions dépend de la loi du lieu où elles ont reçu leur "perfection; l'acte valable ou nul d'après cette loi le sera "également partout." And he adds: "La même loi est "encore applicable lorsque, la validité intrinsèque de la "convention n'étant pas contestée, il y a simplement lieu de "*l'interpréter.*"

But to this statement of a general rule he subjoins five important exceptions (*g*).

The first, alone, is so considerable as to shake the foundations of the rule: viz. when the act or contract is to be *executed* [or *performed*] in a country different from that in which it is *made*.

In the opinion of the writer of these pages, as will presently be seen, this exception is the rule, and the exception and rule should change places.

The second exception is one already referred to, and universally admitted, when the contract is contrary to the morality or public policy of the State.

The third exception is when the Court has to decide, not on the substance of the plaintiff's claim (*le fond de la*

(*f*) Liv. ii. tit. i. c. ii. s. 96.

Merlin, Rép., Etranger, II., ad finem. (Tome xi. p. 186, edit. 1826.)

(*g*) *Fœlix, ubi sup.* ss. 97-102.

demande), but on the defendant's particular reply to it (*des défenses*).

It can scarcely be doubted, however, that whatever may be said—and something is said in a later chapter as to the mode of procedure and all that appertains to it being governed by the *lex fori*—Fœlix errs in ranging under that Law what foreign jurists call *défense* or *exception péremptoire, i.e.* a plea to the validity of the obligation itself, and not merely the technical defence which is implied by the simple term exception.

The fourth exception is when two or more fellow-citizens enter into a contract in a country equally foreign to both.

In this case Fœlix follows John Voet (*h*) in pronouncing, that if the contract be in accordance with the Law of their common country it is valid everywhere, and at all events in their own country.

The fifth exception is when the contract is entered into for the purpose of evading and defeating the Law of the country of one of the contracting parties (*i*).

But this is an exception which Savigny rejects, and as to which Demangeat, the last editor of Fœlix, thinks it open to the discretion of the judge to say whether the contract shall be null and void or some other penalty be inflicted (*k*).

DCLXII. To the foregoing exceptions Fœlix adds special considerations upon the following points (*l*):

i. Where the contract has been made whilst the parties contracting were passing through different places.

ii. Where it has been effected by an agent or by correspondence.

iii. With respect to the confirmation of contracts.

(*h*) *Ad Dig.* lib. i. tit. iv. pars ii. *De statutis*, s. 15.

(*i*) *Fœlix, ubi sup.* s. 102.

(*k*) *Fœlix, ubi sup.* c. i. (Forme extérieure) s. 82, *Demangeat's* note (*a*).

[(*l*) *Fœlix, ubi sup.* c. ii. ss. 104-108.]

iv. With respect to changes in and modifications of contracts.

v. With respect to conditional conventions or contracts.

These special points will be considered in the following pages, in which the doctrine of the English and United States Courts, on the general subject of foreign contracts, is about to be discussed.

CHAPTER XXXV.

OBLIGATIONS—SUBSTANCE—*continued.*

DCLXIII. Fourthly—

We have to consider what are the rules to be deduced from the writings of jurists, and from the decisions of the tribunals in England and the United States of North America, upon a real or apparent conflict of laws with respect to the *substance* of obligations or contracts. But in prosecuting this inquiry it will be expedient to distinguish between—

i. The general Law relating to Obligations and Contracts.

ii. The *lex mercatoria* or Law Merchant upon this subject, which again requires subdivision into—

a. The general Law Merchant.

β. The Law relating to Bills of Exchange.

DCLXIV. Story's eighth chapter in his "*Conflict of Laws*" is rich in ample quotations from jurists of a date precedent to the present century, with the exception of the great civilian Donellus, to whom it is a matter of surprise that he makes no reference, although this admirable commentator does not treat directly of a conflict of the laws of different states.

Of the modern writers, such as Fœlix, Massé, Demangeat, in France,—Rocco in Italy,—Wächter and Savigny in Germany,—Story refers, and but occasionally, to Fœlix alone.

In the following pages the writings of these authors will be frequently referred to (*a*); while for the earlier

(*a*) See also [*Bar's International Law, Private and Criminal*, translated by G. R. Gillespie, §§ 66-88.]

writers, with the exception of Donellus, Story will be very generally relied upon.

DCLXV. There are particular expressions of modern jurists upon the subject of obligations and contracts, to the understanding of which the following observations may conduce (*b*).

The *facts* which found a *legal right* are of two kinds, and, so to speak, perform two functions (*c*) :—

i. They are either such as perform the general and necessary function of causing the *application* of an ascertained rule of Law;

ii. Or they perform the particular and accidental function of necessitating the *making* a rule of Law, to meet the special case.

In the language of English jurisprudence, the former case would be governed by the application of the express words of a statute or the authority of a judicial precedent; the latter case would be governed by the new application of an old principle of Law.

Having regard to these two classes of facts, modern jurists have very generally adopted a division of the attributes of an obligation into—

α. Essentialia;
β. Naturalia;
γ. Accidentalia;

a division which rightly implies that in an obligation there are inherent—

α. Attributes without which the very notion of the obligation would be at an end; as, in a loan, the actual delivery of the thing lent.

β. Attributes which are inherent in the obligation, but which the will of the contracting parties may separate

(*b*) *Savigny, Obligationenrecht*, i. s. 3.

(*c*) [" . . . dass die juristischen Thatsachen überhaupt in zwei verschiedenen Functionen vorkommen." *Savigny, ibid.* s. 4; *et cf. Savigny, R. R.* iii. s. 104.] These observations are applicable to other portions of Law, as well as to obligations.

from it; as, the *diligentia*, which, as a matter of general law, is required at the hands of the Vendor, or the Hirer.

γ. Attributes which are not, as a matter of general Law, inherent in the obligation, but which the will of the contracting parties may make so inherent (*pacta adjecta*).

DCLXVI. The Roman jurists recognized these distinctions; but it is important to observe how they applied to them the technical terms of their legal vocabulary (*d*). They use two technical terms to express the *essentialia* of modern jurists.

i. *Substantia;*
ii. *Natura;*

but they still more frequently use the term "*natura*" to express the *naturalia* of modern jurists.

In applying therefore the Roman Law, great care must be taken to ascertain in which sense the term *natura* is used in the passage cited.

DCLXVII. Many modern jurists also make use of the expression *autonomy*, as designating the case in which the *facts* founding the legal right are of the special character belonging to the latter of the two divisions just mentioned; but against this use of the term Savigny strongly protests (*e*). It is a term borrowed from the Public Law of Germany, in which system it is used to designate a peculiar privilege of the nobles and of certain Corporations to govern themselves by a kind of domestic legislation. Having therefore a defined juridical meaning, the applica-

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(*d*) "Quod si nihil convenit, tunc ea præstabuntur quæ *naturaliter insunt* hujus judicii potestate."—*Dig.* lib. xix. t. i. 11, § 1.

"Et potest mandatum ex pacto etiam *naturam suam* excedere."—*Dig.* lib. xix. t. v. 5, § 4.

"Quotiens enim ad jus quod *lex naturæ ejus* tribuit, de dote actio redit."—*Dig.* lib ii. t. xiv. 27, § 2.

(*e*) *Oblig.* i. s. 4, and *R. R.* viii. s. 360, notes (*a*), (*b*), (*c*).

tion of it, either to the case above mentioned or to the case in which persons voluntarily submit themselves to a particular local Law, is, in the opinion of this eminent man, to weaken its proper meaning, and to gain neither precision nor clearness by its novel use.

DCLXVIII. As this chapter will contain an investigation of the modern rules which govern the substance of *foreign* Contracts, or, according to the phrase to which in England we are most accustomed, the *conflict of laws* on this subject, it seems expedient to arrange the investigation so as to make it, in some degree at least, accord with what appears to be the best division adopted by continental jurists; that is, to consider the Law which governs—

1. The *validity*, *nature*, and *interpretation* (*f*) of the Foreign Contract.

2. The *immediate effects*, flowing *directly* from the nature of the Contract, and so bound up with it that without them there would be in fact no contract (*g*).

(*f*) *Massé, Le Droit Commercial*, liv. ii. tit. ii. c. i. s. 110 (ed. 1844), s. 596 (ed. 1874), says, Il faut distinguer entre—

1. *L'interprétation* (under which he includes the nature of the engagement).

2. *Les effets.*

3. *Les suites.*

Rocco, lib. iii. c. v. p. 319, "All' intrinseca validità dei contratti, ed alla natura e qualità di essi," c. vi. p. 322.

Fœlix, liv. ii. tit. i. s. 96: " . . . la valeur intrinsèque, la substance, le lien [(*vinculum juris*) des conventions, dépend de la loi. . . . La même loi est encore applicable lorsque, la validité intrinsèque de la convention n'étant pas contestée, il y a simplement lieu de l'interpréter."]

Story, Confl. of Laws, c. viii., in which the want of a preliminary notice of the heads under which the subject is distributed must be supplied, by referring the reader to ss. 242, 263, 321, 322, and 330. It will be seen from comparing s. 263 with s. 321, that Story confuses the distinct considerations of the *nature* and *effect* of Contracts.

(*g*) *Rocco*, c. vii. p. 329: "Perciò le appelliamo *immediate*, essendo il risultamento diretto della convenzione ed ad essa affatto inerenti."

Fœlix, ubi sup. s. 109: "Il ne faut pas confondre *les effets* des contrats avec *les suites* accidentelles qu'ils peuvent engendrer."

Massé, liv. ii. tit. ii. s. 113 (ed. 1844), s. 598 (ed. 1874).

These are what French jurists designate as *les effets* as distinguished from *les suites*. So Fœlix observes: "*Les* "*effets* dérivent de la nature même de l'acte ou de l'exer- "cice du droit établi par cet acte."

3. The *mediate effects* (*h*), flowing *indirectly* from the nature of the Contract, and therefore requiring the happening of some previous event, as the condition of their existence, which is not required by the *immediate* effect. The mediate effects are not inherent in the Contract, which may exist without them. Indeed, the parties may stipulate for their absence. These are called *les suites* by French jurists: ["Sous la dénomination de "*suites du contrat*," says Fœlix, "on comprend les obliga- "tions ou les droits que le législateur fait naître à l'occa- "sion de l'exécution de l'acte ou du droit]; les suites "n'ont pas une cause inhérente au contrat même; elles "résultent d'événements postérieurs au contrat et qui "surviennent à l'occasion des circonstances dans lesquelles "le contrat a placé les parties" (*i*).

Under the head of *mediate effects* Fœlix includes the *accidental consequences*; they are with perhaps more accuracy treated by Rocco as a distinct division, but it is proposed to consider them together in the following pages (*k*).

These arise from some fact posterior to the making of

(*h*) *Rocco, ubi sup.*: "Queste si chiamano *mediate*, perchè per esistere vuolsi una cosa di più, che nelle immediate conseguenze non si chiede." He instances a guarantee for eviction in the event of the *dominium* of a thing sold not belonging to the seller.

(*i*) *Fœlix, ubi sup.* s. 109.

(*k*) "V' ha una terza specie di conseguenze, le quali nè *immediammente* nè *mediammente* dal contratto, ma *ex post facto* originano da un avvenimento posteriore ad esso, come a dire dalla negligenza, dalla mora, e da ogni colpa incorsa in eseguendo l' obbligazione. Si sviluppano nella esecuzione del contratto, sono un remoto risultamento delle relazioni cui il contratto stesso ci mette; ma necessarie non sono ad ottenere gli effetti propri di ciascuna obbligazione, non hanno una causa inerente alla convenzione."—*Rocco, ubi sup.* pp. 330-1.

the contract, and flowing neither directly nor indirectly from it, but from the act of the parties subsequent to it; such as negligence, delay (*mora*), or any other fault in the fulfilment of the obligation, and the reparation of an error, defect, or fault by subsequent ratification.

DCLXIX. 1. *First*, according to the order which has been laid down, we have to consider the principles of comity applicable to the *Validity*, *Nature*, and *Interpretation* of foreign Obligations and Contracts (*l*).

Story (*m*) deals, as English and United States lawyers generally do, with the whole question of *obligations* under the head of *Contracts*, and he remarks, that according to universally admitted principles every valid Contract requires—

a. That it should be made by parties capable of contracting.

β. That it should be voluntary.

γ. That it should be on a sufficient consideration.

δ. That it should be lawful in its nature.

[*ε*. That it should be in its terms reasonably certain (*n*).]

We need not stop to inquire whether these positions are strictly accurate or the language sufficiently precise. Their general truth is apparent. He then lays down a canon, that if a Contract be valid in the place where it is made, it is valid everywhere (*o*). There are, indeed, ex-

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(*l*) *Fœlix*, liv. ii. tit. i. c. ii. s. 1: Valeur intrinsèque des engagemens bilatéraux et unilatéraux.

(*m*) *Conflict of Laws*, chapter viii.

The Scotch Law may be said, theoretically at least, to preserve, as from the more philosophical structure of its jurisprudence might be expected, the distinction between the two. ["Such obligations are either unilateral or mutual; the former being strictly called *Obligations*, the latter *Contracts*."—*Bell's Principles of the Law of Scotland* (Guthrie's ed. 1885), vol. i. ch. i. s. 5.]

(*n*) *Story*, *ibid.* s. 232.

Kent makes a simpler division into—1, the obligation and construction of contracts; 2, the application of the remedy.

(*o*) *Ibid.* s. 242.

ceptions, such as have been already noticed on the general subject of the reception of Foreign Law (*p*). He observes that the same rule applies, *vice versâ*, to the invalidity of contracts (*q*).

Story's next canon, relating to the substance of contracts, is that the *lex loci contractûs* (*r*) governs their (*s*)

a. Nature.
β. Obligation (*t*).
γ. Interpretation.
δ. Effects (*u*).

DCLXX. This statement, however, respecting the paramount influence of the *lex loci contractûs*, though simple and clear enough at first sight, proves on further inspection to be, without an important qualification and limitation, a very unsafe guide in unravelling the jurisprudence on Foreign, or indeed English, contracts or obligations.

For much later in his chapter on "Foreign Contracts," Story is obliged to admit that "there is no doubt that the "phrase *lex loci contractûs* may have a *double meaning* or "aspect; and that it may indifferently indicate the place "where the contract is actually made, or that where it "is virtually made according to the intent of the parties; "that is, the *place of payment or performance*" (*x*). Then he remarks that most of the foreign jurists "do expressly "and directly recognize the rule, that, where the contract

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(*p*) *Story, Conflict of Laws*, s. 244, *et vide suprà*, §§ xii–xviii.

(*q*) *Ibid.* s. 243.

The next canon relates to the *form*, and is that the formalities required by the *lex loci* for contracts are indispensable everywhere else.—*Ibid.* s. 260.

(*r*) *Vide infrà*, §§ dclxx., 2nd dclxxi., for the impropriety of this phrase.

(*s*) *Ibid.* s. 263.

(*t*) "The *obligation* of a Contract is the duty to perform it, whatever may be its *nature*."—*Ibid.* s. 266.

(*u*) *Ibid.* s. 321.

(*x*) *Ibid.* s. 299.

" is made in one place and is to be performed in another, " not only may the Law of the latter be properly called " the *locus contractûs*, but that it ought in all respects, " except as to the formalities and solemnities and modes " of execution, to be deemed the rule to govern such " cases " (*y*). Nay, he goes further, and inclines to admit the validity of the reasoning which establishes the converse proposition, namely, that a contract invalid by the Law of the place where it is made, is valid if good by the Law of the place of payment (*z*).

DCLXXI. The reader of the foregoing pages will not fail to observe how far these admissions and qualifications go to justify the remark of Savigny, as to the impropriety of the expression *lex loci contractûs*, and to establish the strength of his position that the true seat of an obligation is the place of its fulfilment—[*Erfüllungsort* (*zz*).]

Any diligent reader of Story's learned and valuable chapter on " Foreign Contracts " cannot fail to be perplexed by the indistinct manner in which the general principle of their construction is, in spite of the mass of authorities cited, laid down. It seems to the writer of these pages that the language of Gothofredus, cited by Story himself in a later part of the same chapter, enunciates the true principle in the concisest manner: " Hæc verba ' Ubi contractum est,' " sic intellige, ubi actum est ut solveret " (*a*).

DCLXXII. It must be always borne in mind that the object of the tribunal which has to decide upon a contract, must be to ascertain what was the *intention of the parties*; that intention, unless a positive law of the State interposes a bar, is the Law of the contract.

If that intention be not clear, recourse must be had to

(*y*) *Story, Conflict of Laws*, s. 301 *a*.
Vidal v. *Thompson*, 11 *Martin*, (*Louisiana*) *Rep.* p. 23.

(*z*) *Story, Conflict of Laws*, s. 305. Cf. ss. 278, 286, 287, 290, 296, 300, 301, 301 *a*.

[(*zz*) " Es liegt daher im Wesen der Obligation, dass der Ort der Erfüllung als Sitz der Obligation gedacht . . . werde."—*R.R.* viii. s. 370.]

(*a*) *Gothofred.* ad *Dig.* lib. xxii. t. i. 1, note 9.

presumptions, either those of facts arising from the particular circumstances of each case; or those of Law, in the absence of such particularity. The latter, which have been established partly by judicial decisions, partly by general acceptance, from a respect paid to the jurists who have enunciated them, are in truth the subject of the present consideration (*b*).

DCLXXIII. The cardinal principle of the English Law upon the obligations and relations of the foreigner in England is thus laid down by Lord Ellenborough: "We "always import," says this learned judge, "together with "their persons, the existing relations of foreigners as "between themselves according to the laws of their re- "spective countries; except, indeed, where those laws "clash with the rights of our own subjects here, and one "or other of the laws must necessarily give way, in which "case our own is entitled to the preference. This having "been long settled in principle, and laid up among our "acknowledged rules of jurisprudence, it is needless to "discuss it any further" (*c*).

There are obligations which must necessarily from their nature be fulfilled or performed in a particular place: this original necessity furnishes a rule for the interpretation of the obligation, for the Law of that particular place must have been contemplated as the Law of the obligation by the parties to it.

The case is stated by Lord Mansfield, in one of those judgments which have made English Jurisprudence so largely indebted to him: "There is a distinction," this

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(*b*) *Fœlix*, s. 96, says: "Lorsque les contractans n'ont pas expressément adopté la loi du lieu où le contrat a été passé, alors commencent les présomptions. . . . Toutes les législations sont d'accord pour établir que lorsqu'il s'agit d'une convention, le juge doit s'attacher principalement à la commune intention, expresse ou présumée, des parties." He then cites the Roman Law, various existing Codes, and *Kent's Comm.* vol. ii. pp. 554, 555 (part v., lecture 39).

(*c*) *Potter* v. *Brown*, 5 *East*, *Rep.* at p. 131.

great jurist says, "between *local* and *personal* statutes. "Local ones regard such things as are really upon the "spot in England, as the Statute of frauds, which respects "lands situate in this kingdom. So stock-jobbing con- "tracts and the statutes thereupon have a reference to our "local funds; and so the statutes for restraining insur- "ances upon the exportation of wool respect our own "ports and shores. Personal statutes respect personal "transitory contracts, as common loans or insurances (*d*). ". . . In every disposition or Contract, where the subject- "matter relates locally to England, the Law of England "must govern and must have been intended to govern. "Thus a conveyance or will of land, a mortgage, a con- "tract concerning stocks, must all be sued upon in "England." Lord Mansfield adds these strong and clear expressions: "*And the local nature of the thing requires "them to be carried into execution according to the Law "here*" (*e*).

DCLXXIV. And yet, as will be seen in the matter of testaments, "the local nature of the thing" bequeathed does not, according to the English decisions, necessarily cause the English Law to govern the instrument, if the testator be domiciled abroad, and it appears that if the testament bequeath property, which the English Law considers as personal, *e.g.* leasehold for any definite number of years, it will be pronounced by the English tribunals valid or invalid according to the Law of a foreign domicil (*f*). It should be remarked that Lord Mansfield, in the case just cited, uses the term *statute* in the sense affixed to it by Civilians.

DCLXXV. As to the *validity* of the Contract, the

(*d*) *Robinson* v. *Bland* (leading English case), 1 *W. Blackstone, Reports*, at p. 246.

(*e*) 2 *Burrow, Rep.* at p. 1079, after second argument on the case. [Cf. 1 *W. Blackstone, Rep.* at pp. 258, 259.]

(*f*) See on this point *Freke* v. *Lord Carbery*, *L. R.* 16 *Eq.* p. 461; *et vide suprà*, § xlii.A. [See *Studd* v. *Cook*, *L. R.* 8 *App. Ca.* p. 577.]

presumption of Law is, in the absence of an express declaration or a strong counter-presumption, that the parties intended to observe the Law of the place in which the contract was made (*g*). "La valeur intrinsèque," Fœlix says, "la substance, le lien (*h*) (*vinculum juris*), "dépend de la loi du lieu où elles ont reçu leur perfection; "l'acte valable ou nul d'après cette loi le sera également "partout" (*i*).

The same rule applies to what is termed *the nature* (*k*) of the Contract, but which is perhaps more properly included under the next category of *interpretation*.

DCLXXVI. The Court of Louisiana has expressed itself as follows: "The idea that the Law of a man's "domicil follows him through the world, and attaches to "all his contracts, is as novel as unfounded. The pro- "position was not, indeed, maintained in general terms; "but that offered to the Court in relation to the contract "is identical with it; and it is impossible for us not to "feel that, if the defendant . . . is to have the contract "decided by the laws of Louisiana, it will be equivalent

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(*g*) *Trimby* v. *Vignier*, 1 *Bingham, New Cases*, p. 151;
De la Vega v. *Vianna*, 1 *Barnewall & Adolphus, Rep.* p. 284;
British Linen Company v. *Drummond*, 10 *Barn. & Cress. Rep.* p. 903, —are the leading English cases; [and see *Bradlaugh* v. *De Rin*, *L. R.* 3 *C. P.* p. 538, and 5 *C. P.* p. 473. *Cooper* v. *Cooper*, *L. R.* 13 *Ap. Ca.* p. 88; *Lee* v. *Abdy*, *L. R.* 17 *Q. B. D.* p. 309.]
Bank of United States v. *Donnally*, 8 *Peters*, (*Supreme Court of U.S.A.*) *Rep.* p. 361; and *Wilcox* v. *Hunt*, 13 *Ibid.* p. 378,—are the leading cases in the U. S. of North America.
[The Law of the place where the contract is made governs as to the rights and liabilities of the parties; that of the place of performance as to the enforcement. *Burchard* v. *Dunbar*, in Supreme Court of Illinois, *American Reports by Isaac G. Thompson*, vol. xxv. p. 334; and see *Hoadley* v. *Northern Transportation Co.* in Supreme Judicial Court of Massachusetts, *ibid.* vol. xv. at p. 108; and 1 *Lathrop's Mass. Rep.* at p. 306. *Infrà*, §§ dcxciii-dcxciv.A.]
(*h*) Fœlix (liv. ii. tit. i. s. 97) calls all these *solennités intrinsèques*.
(*i*) *Fœlix*, *ibid.* s. 96.
(*k*) *Vide suprà*, § dclxix.

" to a declaration of this amount, that an inhabitant of " this State carries its laws with him wherever he goes, " and they regulate and govern his contracts in foreign " countries—that, whether a man contracts with him in " Paris or London, our municipal regulations are the " measure of the rights and duties of both parties to the " contract. That the legislature of Louisiana may have a " right to regulate the contracts of her own citizens in " every country so long as they owe her allegiance, may " or may not be true. But where the citizen contracts " abroad with a foreigner, it is evident that the rule must " be limited in its operation. The legislature may refuse " permission to enforce the agreement at home; but " abroad, and particularly where the agreement is entered " into, it is valid. *The general rule, however, is never to* " *extend the prohibition to contracts made abroad unless* " *there be an express declaration of the legislative will*" (*l*).

DCLXXVII. The following extract from a letter of Sir L. Jenkins to Charles II. contains a clear statement of what were, in that very learned civilian's opinion, the true principles of International Law respecting the enforcement of a bond of foreign obligors.

" That whether the bond in question was sealed and " delivered in Scotland or in England, your Majesty may " please, if it be transmitted, or remaining in the registry " of the Admiralty of Scotland, to order the registrar of " that court (who by his office stands chargeable with it) " to transmit hither the original bond: That the peti- " tioner may have the remedy which the Law affords upon " a bond against the sureties living in England, it being " usual in aid of justice, as in all other places of Christen- " dom, so in these your Majesty's two kingdoms, *to have*

(*l*) *Arayo* v. *Currell*, 1 *Louisiana Rep.* at p. 534 (A.D. 1830). Mr. Justice Martin delivered the opinion of the Court, which is cited at length in the 5th edition of *Story's Conflict of Laws* (Boston, 1857), pp. 445–458, s. 286 *c*, note 1.

"*the benefit of Law*, and execution *where the obligors in a* "*bond do live*, though the bond itself were not made in "the same kingdom."

"This is the constant usage in all parts where the "Civil Law obtains, and I myself can, upon experience, "witness the practice of it in Scotland; for a merchant "of Aberdeen, having become bound to me in a statute "merchant of 3,000*l.* in the manner and form peculiar to "England, I (being intrusted for a stranger) have been "lately forced to sue that statute merchant, and having "transmitted the original bond into Scotland, I have had "very good justice before the lords of your Majesty's "sessions there, and execution against the party, though "there be no such form of obligation as our English "statute merchant is, received or known in Scot-"land" (*m*).

DCLXXVIII. We have considered the principles of Law applicable to the *validity* and *nature* of the Contract.

We next approach the question of the *Interpretation* of the Contract (*n*).

The rule of the English and North American United States lawyers upon this matter is, "that the interpreta-"tion of the contract must be governed by the laws of "the country where the contract is made;" but Story, who lays down this rule, immediately adds, "Especially "in interpreting ambiguous contracts ought the domicil "of the parties, the place of execution, the various pro-"visions and expressions of the instrument, and other "circumstances, implying a local reference, to be taken "into consideration" (*o*).

(*m*) *Wynne's Life of Sir L. Jenkins*, vol. ii. p. 749.

(*n*) With respect to [measurement of the tonnage of] *Ships* there is a very peculiar provision in English Statute law referring to the case of a conflict of laws—17 & 18 Vict. c. 104, ss. 20 *et seq.*; 25 & 26 Vic. c. 63, ss. 4, 60. [*The Franconia*, *L. R.* 3 *P. D.* p. 164.] *Vide infrà*, chap. xli.

(*o*) *Conflict of Laws*, s. 272.

DCLXXIX. The foreign jurists (*p*) say that there are three sources from which, according to the circumstances of the case, the interpretation of a contract may be derived:

α. The law of the State in which it is made.

β. The law of the State in which it is to be performed.

γ. The law of the domicil of the parties (*q*).

But it will be found on examination that the third is pretty much identical with the second, for the Law of the domicil is resorted to because the presumption is that the Law was that which the parties intended should govern the performance of the contract; and it will also be found, though the matter is involved in the obscurity of redundant verbiage, that the *lex loci contractûs* practically means the Law of the place of performance; which, after all, is the Law which it is endeavoured to discover through the medium of legal presumption when the contract is silent or ambiguous (*r*).

DCLXXX. The Roman Law says, "Semper in stipu-"lationibus et in ceteris contractibus id sequimur quod "actum est; aut si non pareat quid actum est, erit con-"sequens ut id sequamur quod in regione, in quâ actum "est, frequentatur" (*s*). And again, "Ea enim quæ sunt "moris et consuetudinis in bonæ fidei judiciis debent

(*p*) "Lors donc que le lieu de l'exécution est celui du domicile des parties ou celui de la passation du contrat, on peut poser comme règle générale que c'est la loi du lieu de l'exécution qui détermine les effets solidaires de l'obligation. Mais lorsque l'obligation doit être exécutée dans un lieu qui n'est ni celui du domicile des obligés, ni celui du contrat, j'inclinerais pour la loi du lieu du contrat, quand les parties n'ont pas la même nationalité; et pour la loi du domicile, quand il s'agit d'individus de la même nation contractant ensemble en pays étranger."—*Massé, Le Dr. Comm.* vol. ii. p. 193 (ed. 1844); liv. ii. t. ii. c. i. s. 623 (ed. 1874).

(*q*) *Fœlix*, s. 94.

(*r*) *Merlin, Rép.* Loi, VI. s. 2.

(*s*) *Dig.* lib. l. t. xvii. 34.

" venire " (*t*). Savigny shows, as has been seen, that the former passages applied to cases where both parties were domiciled at the place where the contract was made; but this distinction has not been observed by foreign codes or jurists.

The Civil Code of France reproduces the maxim in these words: " Ce qui est ambigu s'interprète par ce qui " est d'usage dans le pays où le contrat est passé " (*x*), though, according to Fœlix (*y*), this article of the French Code was not intended to refer to foreign contracts. But Delvincourt (*z*), Toullier (*a*), Merlin (*b*), and Massé (*c*) are of the contrary opinion.

Merlin founds his opinion on the ground that those who contract in a state must be holden to submit themselves to the Law of that state. Massé, pronouncing this opinion of Merlin to be a resolution of one question by another, puts the adoption of the Law of the state on the ground that there is no other Law by which the will of the contracting parties can be interpreted, when they are both foreigners contracting in a foreign land.

DCLXXXI. But Massé does not apply this rule to foreigners belonging to the same nation or to a contract to be performed in the country of the contracting parties. Massé further agrees with Boullenois and Dumoulin, that no rule of Law overrides the intention of the parties when that can be discovered. Dumoulin therefore says, with truth as well as energy, " Quia putant ruditer et " indistinctè quod debeat ibi inspici locus et consuetudo

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(*t*) *Dig.* lib. xxi. t. i. 31, § 20; *et vide Dig.* lib. v. t. i. (*De judiciis*), *Dig.* lib. xxi. t. ii. 6 (*De evict.*).

(*x*) *Art.* 1159.

(*y*) *Fœlix*, s. 120.

(*z*) *Ibid.* [citing *Delvincourt*, tome i. p. 29.]

(*a*) *Ibid.* [citing *Toullier*, tome vi. numéro 219.]

(*b*) *Rép.* Loi, VI. s. 2.

(*c*) *Le Droit Comm.* vol. ii. p. 153 (ed. 1844); liv. ii. t. ii. c. i. s. 597 (ed. 1874). [He cites Boullenois, tome ii. pp. 459, 495, 501.]

" ubi sit contractus; quod est falsum; quin imo jus est " in tacitâ et verisimili mente contrahentium."

DCLXXXII. In truth, to those who hold absolutely the doctrine of *locus regit actum* as applicable, not merely to the form (a subject discussed in a previous chapter), but to the validity, nature, and interpretation of the obligation, a question of no mean difficulty presents itself for solution—namely, Is this rule applicable to foreigners temporarily commorant or transient, as well as to domiciled persons? Donellus (*d*) observes, with respect to the *mercator advena*, and the *maritus in causâ dotis*, that these persons constitute an exception to the rule, that the defendant must defend himself *ubi contraxit*, because in these special cases there was a tacit agreement to the contrary in the original contract.

DCLXXXIII. It is well observed by Savigny (*e*) that there are two senses in which the expression "interpretation" may be used, a general and a restricted sense. According to the former, the application of every rule of Law which supplies what is not literally stated in the contract, falls under the category of interpretation. It is manifest, however, that this generalisation of the expression deprives it of any proper and peculiar signification. In order to give it this, a restricted sense must be imposed upon it; it must be confined to cases of doubt arising from the defective structure or ambiguous expressions of the contract. It is a question of fact, like the interpretation of a Law. The object is in both cases to ascertain the true meaning which the oral or written words were intended to convey.

It is in this sense that the Roman lawyers said, "Id

(*d*) *De Jure Civ.* lib. xvii. cap. xiv. 16, 17.

(*e*) *Savigny, R. R.* viii. s. 374, where see note (*a*). He selects as the principal authors on this point of interpretation, *Boullenois, Traité des Statuts réels et personnels*, tome ii. pp. 489-538 (tit. iv. chap. ii. obs. 46, règle 10); *Story*, ss. 272-280; *Wächter, die Collision &c., Archiv*, Band xix. 114-125.

"sequimur quod actum est" (*f*), "In obscuris inspici solet "quod verisimilius est, aut quod plerumque fieri solet" (*g*).

DCLXXXIV. Interpretation is not therefore, according to Savigny, a question of the application of a *lex loci*, though the local language may serve to explain the mind of the contracting parties; but if the question be, what place furnishes the language which is the subject of doubt, Savigny denies that the answer can be either the place in which the contract was entered into, or the place in which it is to be fulfilled.

Savigny illustrates this position by the case of a contract effected by correspondence. The language of the contract in this case is to be construed by the usage of the place in which the writer of the first letter dwelt, not by the usage of the place in which the letter was received and accepted, although this is the place in which the contract was concluded, because the writer of the first letter must be presumed to have had the meaning of the language of the place in which he dwelt, and from which he was writing, present to his mind at the time.

Wächter furnishes another illustration in support of the same position. An Insurance company (*h*) at Leipsic contained among its printed terms an exception in the case of [damage incurred through] a disturbance of the public peace (*Aufruhr, émeute*). An insured property having been set fire to from without (*auswärts, dehors*), the question arose whether the company were protected by the exception, inasmuch as the legal construction of what constituted a disturbance of the public peace varied in different states. Wächter rules rightly, according to Savigny, that the Saxon Law, under the dominion of which the terms of the insurance were made, furnishes the true interpretation (*hh*).

(*f*) *Dig.* lib. l. t. xvii. 34.
(*g*) *Ibid.* 114.
(*h*) Evidently fire insurance.
[(*hh*) Cited in *Savigny, ubi sup.* note (*d*).]

DCLXXXV. The domicil is, according to Savigny, an important element in the question of interpretation. If the contract be made orally or in writing in the place in which both parties are domiciled, the language of that place is unquestionably applicable to the interpretation.

This is not necessarily the case when only one party has his domicil in that place. It is then a matter of inquiry whether it is probable that the non-domiciled party was acquainted with, and intended to use, the language according to its meaning at that place.

The position of the Roman Law, "ut id sequamur quod "in regione, *in quâ actum est*, frequentatur" (*i*), is not opposed to this doctrine; for this text proceeds on the natural supposition that both parties are domiciled in the place of the contract. The same remark applies to another passage: "Si fundus venierit, ex consuetudine ejus regionis, "in quâ negotium gestum est, pro evictione caveri opor-"tet" (*k*).

DCLXXXVI. Upon the same principles Savigny contends that you cannot consider the language of the place of [performance or fulfilment (*Erfüllungsort*)] of the contract as furnishing the invariable guide for its interpretation; though there are certain portions of a contract in which it may be so considered. For instance, if the contract stipulate for a particular sum of money, merchandise according to a particular weight or measure, a quantity of land according to a particular measurement in a particular country; and the terms of the contract which express the value and the weight, or the admeasurement, admit of more than one interpretation, the interpretation supplied by the language of the place of fulfilment is to govern, both because that was in all probability in the mind of the contracting parties; and because it would not unfrequently be impossible to fulfil the contract according to

(*i*) *Dig.* lib. l. t. xvii. 34.
(*k*) *Dig.* lib. xxi. t. ii. 6.

any other interpretation (*l*). Such, it may be observed, is the express provision upon the subject in the Prussian code (*m*).

DCLXXXVII. Here again it is to be observed that there are passages in the Roman Law which are apparently but not really at variance with these principles.

For instance, in that system of jurisprudence it is said, that, in the case of a *stipulation*, the interpretation is to be against the person who stipulates (*n*); in the case of sale, against the seller; in the case of letting, against the proprietor or lessor (*o*).

The reason assigned is, that, as it was in the power of these parties to have prevented by a clearer statement any doubt as to their meaning, the difficulty is, in fact, imputable either to their negligence or their bad faith.

But these passages expressly apply to terms or words which are in themselves obscure or equivocal; whereas the principles and doctrine of interpretation which we have been just considering apply to expressions which are *not* in themselves obscure or equivocal, but have different

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(*l*) *Savigny, ubi sup.* s. 374, citing at note (*f*) *Boullenois*, tome ii. pp. 496–498.

(*m*) [Prussian Code, Theil I. Tit. v. § 256: "Ist ein Contract nach Mass und Gewicht geschlossen, so wird vermuthet, dass dasjenige gemeint sei, welches an dem Orte, wo die Uebergabe geschehen soll, eingeführt ist." § 257: "Ist bei einer Geldsumme die Münzsorte nicht ausgedrückt, so wird im zweifelhaften Falle die an dem Orte, wo die Zahlung geschehen soll, gangbare Münzsorte verstanden."]

(*n*) *Dig.* lib. xxxiv. t. v. 26: "Cum quæritur in stipulatione quid acti sit, ambiguitas contra stipulatorem est."

Dig. lib. xlv. t. i. 38, § 18: "In stipulationibus cum quæritur quid actum sit, verba contra stipulatorem interpretanda sunt."

(*o*) *Dig.* lib. ii. t. xiv. 39: "Veteribus placet pactionem obscuram, vel ambiguam, venditori et qui locavit nocere; in quorum fuit potestate legem apertius conscribere." *Dig.* lib. xviii. t. i. 21: "Labeo scripsit obscuritatem pacti nocere potius debere venditori, qui id dixerit, quam emptori: quia potuit re integrâ rem apertius dicere." *Dig.* lib. l. t. xvii. 172: "In contrahendâ venditione ambiguum pactum contra venditorem interpretandum est."

meanings in different places, though in each place their meaning is clear and unambiguous (*oo*).

DCLXXXVIII. Savigny complains that Story and a host of writers resolve the question of interpretation into a rule of local Law, whether it be the place of making or fulfilling the obligation.

Boullenois (*p*), Savigny (*q*), Wächter (*r*), and others hold that the true object is not to establish an inflexible rule of Law, but to ascertain in each case the real *intention of the contracting parties* by reference to the general rules of interpretation applicable to the construction of contracts.

DCLXXXIX. It is a matter of controversy whether a limitation to that maxim is or is not furnished by the fact, that the contract is made *in transitu* by two foreigners belonging to the same country and not domiciled, but merely *commorant* in the place where the contract is made.

Boullenois (*s*) and other jurists are of opinion that in this case the Law of the domicil governs the contract. Story observes, "Without undertaking to say that the "exception may not be well founded in particular cases, "as to persons merely *in transitu*, it may unhesitatingly "be said, that nothing but the clearest intention on the "part of foreigners to act upon their own domestic Law, "in exclusion of the Law of the place of the contract, "ought to change the application of the general rule. "And indeed, even then, if the performance of the con-

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[(*oo*) Compare in English Law the distinction between *patent* and *latent* ambiguity, and the admission of extrinsic evidence to explain the latter. *Smith's Leading Ca.* vol. ii. Notes to *Roe* v. *Tranmarr*; *Addison on Contracts*, chap. xxvi. section 1.]

(*p*) *Ubi sup.* pp. 494–498.

(*q*) *R. R.* viii. s. 374.

(*r*) *Passim.*

(*s*) *Boullenois*, tome ii. pp. 456, 489, 490 (tit. iv. ch. ii. obs. 46); cited in *Story*, s. 273.

" tract is to be in the same country where it is made, it " seems difficult upon principle to sustain the excep- " tion." (*t*).

DCXC. Fœlix decides that in this case the presumption of Law is in favour of the place where the contract is *perfected*, as he puts it—[that is, concluded.]

" Il arrive parfois que les parties négocient une con- " vention pendant qu'elles parcourent ensemble divers " lieux: quel sera alors le *locus contractûs?* Ce sera celui " dans lequel le contrat *est devenu parfait.* En effet, c'est " là seulement que le *duorum pluriumve in unum placitum* " *consensus* (*tt*) est intervenu: la plupart des auteurs sont " d'accord sur ce point " (*u*).

Titman and Wächter, however (says Fœlix), think that the engagement of each party should be decided by the Law of the domicil of each; and Eichhorn is of opinion that each of the parties is limited to such rights as the accidental place, in which he happens to put in force the law, may furnish.

" Mais " (continues Fœlix) " alors il n'y aurait pas de " consentement mutuel des parties *in idem placitum* et par " conséquent pas de Contrat: donc ces deux systèmes " sont inadmissibles" (*v*).

DCXCI. It should seem that proof that the parties were ignorant of the Law of the place of the contract would greatly strengthen the reason for the exception in such a case. If the parties intended that the contract should be performed where it was made, the presumption would be very strong that they intended the Law of the place to govern it.

The case of a foreigner contracting with a native is materially different.

(*t*) *Story*, s. 273.

(*tt*) *Dig.* lib. ii. t. xiv. 1: "Et est pactio duorum pluriumve in idem placitum consensus."

(*u*) *Fœlix*, liv. ii. tit. i. s. 104.

(*v*) *Fœlix, ubi sup.*

DCXCII. It is said, and as it would seem with perfect justice, that a contract being, though valid in the place where it is made, invalid if it be at variance with the Law of the place of its performance, the converse proposition is true; viz. that a contract, invalid where it is made, is valid if in accordance with the Law of the place of its performance (*x*).

Upon this point the Courts of England and the North American United States appear to be agreed. It is chiefly on questions of *interest*—a subject to be presently discussed—that this position of Law has been enunciated (*y*).

DCXCIII. It will be observed that all the rules collected and laid down by Story respecting what he designates the *validity*, the *nature*, the *obligation*, the *interpretation* of contracts, presuppose or assume that the place of *performance* and the place of the *making* of the contract are identical. But when they are not so—that is, neither by express statement nor by tacit implication —then these incidents of the contract are, in conformity with the presumed intention of the parties, to be governed by the Law of the place of *performance* (*z*).

In truth, this proposition was established by Lord Mansfield, the creator of our commercial Law, in one of

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[(*x*) *Story*, s. 305.]

(*y*) *Depau* v. *Humphreys*, 8 *Martin*, (*Louisiana*) *Rep.* New Series, p. 1.

Connor v. *Bellamont*, 2 *Atk. Rep.* p. 381 (*Lord Hardwicke*).

Stapleton v. *Conway*, 3 *Atk. Rep.* p. 726; 1 *Vesey Senior*, *Rep.* p. 427.

Dewar v. *Span*, 3 *Term Rep.* p. 425.

[*De Wolf* v. *Johnson*, 10 *Wheaton*, *Supreme Court Rep.* p. 367.]

Kent's Comm. vol. ii. p. 461. (Part V. lecture 39.)

(*z*) *Story*, s. 280.

Andrews v. *Pond*, 13 *Peters*, *Rep.* p. 65; a leading case, decided in the Supreme Court of the United States. [It is there laid down (p. 78) that "the general principle in relation to contracts, made in one place to be performed in another, is well settled. They are to be governed by the Law of the place of performance."]

the earliest cases which he decided: "The Law of the "place" (he said) "can never be the rule, where the trans- "action is entered into with an express view to the Law "of another country, as the rule by which it is to be "governed" (*a*).

DCXCIV. If no place of performance be specified in the contract, or it be of such a character as to admit of being performed anywhere, then, according to the jurisprudence of England and the United States, it is governed by the Law of the place in which it is made (*b*). So in a leading case decided by the House of Lords, Lord Brougham, speaking of a bill of exchange, drawn and accepted in Paris by a Scotchman domiciled in Scotland, said, "This therefore "must now be taken to be a French debt, and then the "general law is, that where the acceptance is general, "naming no place of payment, the place of payment shall "be taken to be the place of the contracting of the debt" (*c*).

Acting on this principle, the United States Courts have holden, that an antenuptial contract made in reference to another country, as the future domicil of the parties, is governed by the Law of that domicil as to rights of personal property (*d*); and also, that if a merchant in America orders goods from England, and the English merchant executes the order, the contract is governed by the Law of England, on the ground that the contract is there consummated (*e*).

[DCXCIV.A. Questions of validity, of interpretation, and also of the remedy available in case of breach, may

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(*a*) *Robinson* v. *Bland*, 2 *Burrow*, *Rep.* at p. 1077. [*Suprà*, § dclxxiii.]

(*b*) *Story*, ss. 282, 317, 343–346.

(*c*) *Don* v. *Lippmann*, 5 *Clark & Finn. Rep.* pp. 1, 12, 13: *vide post*, § dcccxxvii., the case of *The Milford*, *Swabey*, *Rep.* 362; 4 *Jur. N. S.* p. 417; 31 *L. T.* p. 42.

(*d*) *Le Breton* v. *Miles*, New York Court of Chancery, 8 *Paige*, *Rep.* p. 261.

Kent's Comm. vol. ii. p. 459, note (*d*).

(*e*) *Whiston* v. *Stodder*, 8 *Martin*, (*Louisiana*) *Rep.* p. 95; *Kent's Comm.* vol. ii. p. 459, note (*d*).

arise out of the same contract, and are not always easily distinguishable. In *Hoadley* v. *Northern Transportation Co.*, the defendants made an agreement in Illinois to carry an engine from that State into Massachusetts. The engine was burnt in Illinois whilst in the custody of the defendants, and the owner sought to recover in tort against them before the Massachusetts tribunals. There was a bill of lading, with a clause exempting the defendants from liability in case of fire, which was valid of itself by the Law of Massachusetts, assent being presumed; but which, under the Law of Illinois, required the express assent of the owner; and this assent had not been given. The Court held that the *lex fori* (that of Massachusetts) prevailed, and that the carriers were exempt. "It is a "general rule" (it was said in the judgment) "that personal "contracts must have the *interpretation* and binding force "in all countries which they have in the place where "made. The contract is presumed to have been entered "into with reference to the Law of that place. If for- "malities and solemnities are there required to give validity "to it, the requirement must be shown to have been observed. "But the law of the place where the action is brought, by "the same general rule regulates the *remedy* and all the "incidents of the remedy upon it. The Law of the former "place determines the right; the Law of the latter controls "the admission of evidence and prescribes the modes of "proof by which the terms of the contract are made known "to the Court, as well as the form of the action by which "it is enforced. . . . It is not always, indeed, easy "to determine whether the rule of law sought to be applied "touches the validity of the contract or only the remedy "upon it. In the opinion of the Court the rule of law "laid down in Illinois and here relied on by the plaintiff "affects the remedy only and ought not to control the "courts of this Commonwealth. The nature and validity "of the special contract is the same in both States. It is "only a difference in the mode of proof. A presumption

"of fact in one State is held legally sufficient to prove "assent to the special contract relied on to support the "defence. In the other State it is held not to be sufficient. "It is as if proof of the contract depended upon the "testimony of a witness competent in one place and in- "competent in the other" (*f*).

The law of the remedy is no part of the contract (*g*).

"When the question is settled that the contract of the "parties is legal, and what is the true interpretation of the "language employed by the parties in framing it, the *lex loci* "ceases its functions, and the *lex fori* steps in and determines "the time, the mode, and the extent of the remedy" (*h*).]

DCXCIV.B. [There are some cases in which there is no one country which can be said to be the place of performance. As, for instance, where goods are to be transported from one country to another, possibly over a third country or over sea, possibly again in a ship belonging to a third country. In these cases the law of the place of performance cannot be applied; and where there is a conflict of laws or a difficulty of interpretation necessitating the application of some law, the Courts are reduced to gather the intention of the parties—which is deemed to be the "crucial test"—from the document, or contract, itself "as read by the light of the subject-matter and "the surrounding circumstances" (*i*). That the law of the place of ultimate performance is not necessarily the

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[(*f*) 1 *Lathrop's Massachusetts Rep.* p. 306; and 15 *Isaac G. Thompson's Amer. Rep.* p. 106.

(*g*) *Burchard* v. *Dunbar*, 25 *I. G. Thompson's Amer. Rep.* at p. 338.

(*h*) *Sherman* v. *Gassett*, 4 *Gilmour's Rep.* p. 531, cited in *Burchard* v. *Dunbar*, *ubi sup.*

(*i*) *Lloyd* v. *Guibert*, *L. R.* 1 *Q. B.* at pp. 122, 123; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, *L. R.* 10 *Q. B. D.* p. 521; *Jacobs* v. *Crédit Lyonnais*, *L. R.* 12 *Q. B. D.* p. 589. *Re Missouri Steamship Co.*, decision of Court of Appeal in England, *Weekly Notes*, May 11, 1889; not yet reported in full.]

law governing the interpretation of the contract is shown by the following case.]

S., being in England, took from the P. and O. Company, and paid for, a ticket for the passage from Southampton to Alexandria, and from Suez to Mauritius. In the body of the ticket the engagement of the Company was stated to be subject to the conditions and regulations endorsed thereon. S. signed this ticket. There was endorsed a notice containing the following clause: "That the Company do not "hold themselves liable for damage to, or loss or detention "of, passengers' baggage." [According to French Law, which was in force in Mauritius, this clause was void.] S. lost one package of his luggage during the voyage. No evidence was given of any negligence on the part of the company [beyond what might be implied from the fact of the loss.]

It was holden that [the actual intention of the parties must be taken clearly to have been to treat this as an English contract, to be interpreted] by the Law of England, and not by the law of Mauritius, and that by the terms of the special [clause forming part of the] contract the Company was not liable for the loss of the package (*j*).

[In some cases of carriage of goods by sea, "the law "of the flag," as it is called, that is, the law of the country to which the carrying ship belongs, has been held to be the law with reference to which the parties must be presumed to have contracted (*k*).]

(*j*) *Peninsular and Oriental Steam Navigation Company* v. *Shand*, 11 *Jur. N. S.* p. 771; 3 *Moore, P. C.* (*N. S.*), p. 272. Cf. *Moore* v. *Harris*, *L. R.* 1 *App. Ca.* at p. 331.

[(*k*) *Lloyd* v. *Guibert*, *L. R.* 1 *Q. B.* p. 115. *The Gaetano and Maria*, *L. R.* 7 *P. D.* p. 1 and p. 137. Cf. *Greer* v. *Poole*, *L. R.* 5 *Q. B. D.* p. 272; and *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, *L. R.* 10 *Q. B. D.* at p. 540.]

CHAPTER XXXVI.

CONTRACT—IMMEDIATE EFFECTS—MUTUAL ACCOUNTS—AGENCY—CORRESPONDENCE—INTEREST.

DCXCV. 2. We have now to consider the *second* division of this subject; viz. the *Immediate effects* (*a*) of an obligation, those which are derived from the very nature of the obligation, or the exercise of the rights directly flowing from it; *e.g.* in a contract of buying and selling, the delivery of the thing bought, and the payment of the price for which it is bought, are two immediate effects of the contract. If the contracting parties have chosen to make a power of repurchase or redemption a part of the contract, that, though not belonging, abstractedly speaking, to the obligation, would by their act become one of the immediate effects of it (*b*).

DCXCVI. In the event of doubt, such as must often arise in cases of a mixed nature, whether the parties had reference to the place of the making or the place of the performance of the contract, the inclination of the judges in the United States of North America, which would probably be followed in England, has been to adopt the Law of the place of making (*bb*).

DCXCVII. With respect to a class of immediate effects of Contract of great importance to the commercial code,—namely, the matter of *advances* and *sales*, and *mutual accounts of credit and debt* between merchants,—the courts

(*a*) *Vide suprà*, § dclxviii.

(*b*) *Rocco*, lib. iii. cap. vii. p. 329.

[(*bb*) *Burchard* v. *Dunbar*, 25 *I. G. Thompson's American Rep.* p. 334; 82 *Illinois Rep.* p. 450.]

of the United States have decided that advances are to be governed by the Law of the place where they are advanced; sales of goods by the Law of the place where they are received (*c*). The rule has received practical illustration more frequently in the case of *balances of accounts*. For instance, a case arose in which goods had been consigned for sale in Trieste by a merchant of Boston, and advances were made in Boston by the agent of the consignees to an amount exceeding the amount of the proceeds of the goods when sold. The consignees brought a suit to recover the balance, and the question was at what rate of exchange the balance should be allowed: this raised an earlier question —viz. where was the balance reimbursable? at Boston or Trieste? The Court held at Boston, where the advances had been made; and consequently allowed the par of exchange at Boston; but it held that if the advance had been made at Trieste, the balance would have been reimbursable there (*d*).

DCXCVIII. This case, it will be observed, introduces the question of *agency* in its effect upon the interpretation of foreign contracts.

The decision in it was delivered by Story from the judgment seat, and it is at variance with a later case decided in Louisiana. In that case an advance had been obtained in Louisiana from an agent, residing in that State, of a foreign principal, on merchandise to be shipped to, and sold by, the

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(*c*) *Story*, ss. 282–284 *b*. The leading cases in the United States Courts appear to be—

Coolidge v. *Poor*, 15 *Mass. Rep.* p. 427.

Bradford v. *Tarrand*, 13 *Mass. Rep.* p. 18.

Milne v. *Moreton*, 6 *Binney's Pennsylv. Rep.* p. 353 and pp. 359, 365.

Consequa v. *Fanning*, 3 *Johnson, New York (Chancery) Rep.* p. 587, and same case on appeal, 17 *Johnson, (Supreme Court of New York) Rep.* p. 511.

[See *Merchants' Bank of Canada* v. *Griswold*, 28 *I. G. Thompson's American Rep.* p. 159; 72 *New York Rep.* p. 472.]

(*d*) *Story*, s. 284 *a*; *Grant* v. *Healey*, 3 *Sumner's Circuit Court Rep.* p. 523.

latter abroad; the proceeds of the sale fell short of the advances. It was decided that the rate of interest, on a balance, due to the foreign principal, by reason of this deficiency, must be determined by the Law of the domicil of the principal, where the merchandise was sold.

The judges said, that though this decision conflicted with that of Story, it was in accordance with the general mercantile opinion, which in a matter of this sort was entitled to great weight (*e*).

DCXCIX. The Roman Law enumerates, with its usual perspicuity and conciseness, the categories of this class of conventions. "Labeo ait convenire posse vel re, vel per "epistolam, vel per nuncium; inter absentes quoque posse; "[sed etiam tacitè consensu convenire intelligitur"] (*f*).

DCC. Savigny (*g*) considers the cases of a contract concluded by correspondence, a contract signed at different places, a contract entered into by the oral declarations of an agent.

The more general opinion of continental and especially German jurists is, that a contract by correspondence is made in that place in which the first letter was received and answered in the affirmative. The Law of this place, they say, governs the contract. Savigny, however, rejects this opinion: he compares the writer of the letter to the traveller, who, for the purpose of making a contract, pays a transient visit to the party with whom he is about to contract; and Savigny observes, that if their contract be completed, it would be governed, as to its legal consequences, not by the Law of the place where the traveller sojourned for the moment, but by the Law of the place in which the contract was to be fulfilled. And so in the case of a contract concluded by correspondence, the Law of the place of the

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(*e*) *Ballister* v. *Hamilton*, 3 *Louisiana Annual Rep.* p. 401. *Story*, s. 284 *b*, note 1.

(*f*) *Dig.* lib. ii. t. xiv. 2.

(*g*) *R. R.* viii. s. 373 A. [*Vide infrà*, § dccvi.]

intended [fulfilment (*Erfüllungsort*)], if any place be designated, governs the contract; and if no place of fulfilment be specified, each of the contracting parties may invoke the Law of his domicil (*h*).

According to the Prussian Code, when the Laws of the respective domicils [differ as to the form of the contract], that Law which is most favourable to the maintenance of the [transaction (*Geschäft*)] is to be followed (*i*).

If the Prussian Courts had to decide, not on the maintenance but on the [effects or operation (*Wirkung*)] of the contract, Savigny says the spirit of the Prussian Law would apply to each party the Law of his domicil (*j*).

Grotius says, that a contract by correspondence (*per literas inter absentes*) ought to be governed *jure solo naturæ*; but what Law would be enforced by the *jus naturæ* in this instance he does not specify, though it would appear that it was not the Law of the place in which the contract was actually entered into (*k*).

(*h*) "So gilt für jede Partei das Recht ihres Wohnsitzes."—*Savigny, ibid.*

(*i*) [Prussian Code, Theil I. Tit. v. § 111. "Die Form eines Vertrages ist nach den Gesetzen des Ortes, wo er geschlossen worden, zu beurtheilen."

§ 112. "Ist unter Abwesenden ein förmlicher Vertrag errichtet worden, so wird die Form desselben nach den Gesetzen desjenigen Ortes beurtheilt, von welchem das Instrument datirt ist."

§ 113. "Ist aber der Vertrag unter Abwesenden bloss durch Briefwechsel, ohne Errichtung eines förmlichen Instrument, geschlossen worden, und waltet in den Wohnörten der Contrahenten eine Verschiedenheit der gesetzlichen Formen ob, so ist die Gültigkeit der Form nach den Gesetzen desjenigen Ortes zu beurtheilen, nach welchen *das Geschäft am besten bestehen kann.*"

§ 114. "Eben dieses findet statt, wenn der Vertrag von mehreren Orten, welche in Ansehung der Form verschiedene Rechte haben, datirt ist."]

Savigny, ubi sup.

(*j*) *Ibid.*

(*k*) "Quare etiam si peregrinus cum cive paciscatur, tenebitur illis legibus" (that is, the Law of the *civis*); "quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur. Planè aliud erit si in mari pactio fiat aut in vacuâ insulâ, aut *per literas inter*

DCCI. The Courts of the United States have established the following propositions; that—

i. Where an agent, travelling to procure orders for goods, but not having authority to sell, transmitted from one State to his principal in another State an order for goods to be sent to persons in the first-mentioned State, and the goods were so sent, the sale was made in the State where the principal was, and its legality must be governed by the Law of that State (*l*).

ii. A promissory note (*m*) executed in Canada, with no place of payment mentioned, is to be treated as a Canadian note, and the rights, duties, and obligations growing out of it, are to be determined by the laws of that province (*n*).

iii. Sureties, indorsers, and guarantors are liable according to the Law of the place of their contract (*o*).

iv. The laws of the State where a note is made payable govern the liabilities of the parties thereto; and such laws must be pleaded and proved as matters of fact (*p*).

DCCII Casaregis (*q*), whose reasoning is adopted by Story (*r*), points out that, when a merchant orders his correspondent to buy goods for him in a foreign country, and the correspondent executes the order by buying the goods of a third person, two contracts are created: "duo per-"ficiuntur contractus: primus, *mandati* inter mandantem et "mandatarium; et alter, *emptionis* et respectivè *venditionis* "inter eundem mandatarium, uti emptorem nomine man-"dantis, et venditorem;" and he adds both these contracts

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absentes; talia enim pacta jure solo naturæ reguntur."—*De Jure B. ac P.* lib. ii. cap. xi. § v. 2, 3.

(*l*) *Woolsey* v. *Bailey*, 7 *Foster* (*N. H.*), p. 217.
Smith v. *Smith*, *ibid.* p. 244.

(*m*) *Vide post*, chapter xlii.

(*n*) *Pech* v. *Hibbard*, 26 *Vt.* (3 *Deane*), p. 698.

(*o*) *Walker* v. *Forbes*, 25 *Ala.* p. 139.

(*p*) *Pryor* v. *Wright*, 14 *Ark.* (1 *Barb.*), p. 189.
For notes of the above cases, see Putnam's United States Annual Digest, vol. ix. (1855), p. 378.

(*q*) *Discursus legales de Commercio*, disc. clxxix. num. 10.

(*r*) *Story*, s. 285.

—namely, that of mandate between principal (*mandans*) and agent (*mandatarius*), and that of purchase and sale between the vendor and the agent, as purchaser in the name of the principal—are [concluded] in the place of residence of the agent; ["ambo perficiuntur in loco man-" datarii."]

The doctrine of Casaregis on this subject has been accepted both by England (*s*) and the United States of America (*t*).

DCCIII. A similar principle is applied by Casaregis and adopted by Story as to the *ratification* (*u*), by a correspondent, of a purchase made by an agent without orders. The contract is to be considered as governed by the Law of the place of purchase, and not by the Law of the place of ratification, because that refers back to the place and time of purchase (*x*).

In accordance with this doctrine the acceptance by a person in one country of a bill drawn upon him by a person in another country, is, as will be seen (*y*), a contract in the place where the acceptance is made (*z*).

(*s*) "If I residing in England send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them," Lord Chancellor Lyndhurst observed in *Pattison* v. *Mills*, 1 *Dow & Clarke, Rep.* at p. 363.

The same Law has been laid down with respect to an English corporation contracting by its agent in Scotland; the contract is to be considered a Scotch contract.—*Albion F. & L. Insurance Company* v. *Mills*, 3 *Wilson & Shaw's Scotch App. Rep.* pp. 218, 233.

(*t*) Story remarks (s. 285, note 3) on the difficulty of reconciling this doctrine with what appeared to be the opinion of the court and counsel in *Acebal* v. *Levi*, 10 *Bingham, Rep.* pp. 376, 379, 381. The place of *payment* and *delivery* was in that case different from the place of *Contract*; no *decision*, however, hostile to the opinion in the text was given. Cf. *Story*, s. 262 *a*, n. 1, s. 318, and note; *Vidal* v. *Thompson*, 11 *Martin*, (*Louisiana*) *Rep.* p. 23.

(*u*) *Ratification* is ranked by Fœlix among the *accidental consequences* of a contract, s. 113; *vide post*, chapter xxxvii.

(*x*) *Casaregis, ubi sup.* num. 20, 64, 76-80, 82; cited *Story*, s. 286.

(*y*) *Vide post*, chapter xlii.

(*z*) *Story*, s. 286, [citing *Boyce* v. *Edwards*, 4 *Peters, Rep.* p. 111.] *P. Voet, De Stat.* Sect. ix. c. ii. 14.

Savigny (*a*) admits that this case affords a just exception to the rule, that the Law of the domicil of each acceptor or [indorser] (*Unterzeichner*) should govern, and cites the Prussian Law on this point: by this Law, every engagement resulting from a bill of exchange is governed by the Law of the place in which the engagement is made; if, however, the bill be invalid by the Law of the place in which it is made, but valid according to German Law, subsequent endorsements made in Germany are valid; and a bill drawn in a foreign land between two Germans, if conformable to the German Law, is valid in Germany (*b*).

DCCIV. Hertius takes this view of a conflict of laws between the place of contract and the place of ratification. If the ratification have for its object to supply additional proof or strength to the contract (*ad conciliandam contractui majorem fidem*), then the Law of the place of the contract is to prevail; but if the ratification gives validity to the contract (*ut contractus sit validus*), then the Law of the place of the ratification is to prevail.

This view does not seem unreasonable, though Story appears to discountenance it (*c*).

DCCV. A difficult question upon the Law of agency (*d*) may arise out of mandatory or procuratorial instruments, called in England *letters of attorney* or *proxies* (*e*). It may be that a person resident in one State has authorized by a letter of attorney, duly executed in that State, his agent

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(*a*) *R. R.* viii. s. 373.

(*b*) *Preussische Gesetz-Sammlung* (1849), 68. [The portion of the Prussian Code relating to Bills of Exchange (viz. Theil II. Tit. viii. §§ 713 to 1249) has been repealed, and the subject is now regulated by the "Wechsel-Ordnung" of 1849 and some subsequent amending laws.]

(*c*) *Story*, s. 286 *a*.

Hertii Opera, De Collis. Legum, ii. § 4, num. 55.

The questions arising from the agency of the master of a ship will be considered in chapter xli.

(*d*) *Story*, s. 286 *d*.

(*e*) It is discussed here, though, strictly speaking, perhaps, it belongs to the category of *mediate* effects: *vide suprà*, § dclxviii., *et infrà*.

in another state to sell some moveable property in this second State. The principal dies, the agent sells the property in ignorance of, but after the death. By the Law of some States—*e.g.* Massachusetts—the death of the principal revokes the letter of attorney, and the act of the agent would be invalid; by the Law of other States—*e.g.* France and Louisiana—the act of the agent done in *bonâ fide* ignorance of the death of the principal would be valid (*f*).

If the principal reside in the State the Law of which revokes the letter of attorney, and the agent in the State the Law of which upholds it, which Law shall govern this contract?

Story (*g*) remarks, that there is no doubt that when an authority is given to an agent to transact business in a foreign state for a principal, the authority is, in the absence of proof to the contrary, to be construed and enforced according to the Law of [the place where the business is to be transacted. "But," he continues, "this may well be "admitted to be the rule while the authority is in full "force, without making the law of that place the rule by "which to ascertain whether the original power of attorney "is still subsisting, or is revoked, or dead by operation of "law, in the place of its origin. The point has never, as "far as my researches extend, been directly decided either "at home or abroad."] It would seem, however, that his opinion rather inclines to holding that the Law of the state in which the principal resided should prevail (*h*). But surely the first principle of Private International Law—

(*f*) *Story, Conflict of Laws*, s. 286 *d.*; *Story on Agency*, ss. 488–489. *Civil Code of Louisiana*, art. 3001.
Civil Code of France, art. 2008.
Pothier, Oblig. partie i. chap. i. num. 81.

(*g*) *Conflict of Laws*, s. 286 *d*, citing in a note *Owings v. Hull*, 9 *Peters*, (*Supreme Court*) *Rep.* pp. 607, 627, 628.

(*h*) The analogies, moreover, to which Story refers as to the limited authority of the master of a ship, are questionable. *Vide post*, chapter xli., and *Story, ibid.* s. 286 *b*.

namely, the duty as well as the expedience of upholding, wherever it is possible, *bonâ fide* transactions with the subjects of foreign states—leads to a different conclusion, and is in accordance with the doctrine of France and Louisiana.

DCCVI. This portion of the subject, relating to the law applicable to contracts concluded by a correspondence, may be not impertinently closed by the statement of Savigny's opinion. He observes that—

"The greater number of contracts are concluded at a "personal meeting of two parties. In this case the place "in which the parties are both present, is also the place in "which the obligation originates. This is the road which "is most usually travelled, but it may be departed from by "various ways.

"For instance, a particular law or the will of the parties "may render the observance of certain formalities neces- "sary to the validity of the contract; such as, that the "contract should be reduced into writing, or that there "should be the intervention of a notary public, or of a "court of justice.

"In such cases the true place of the contract is the "place in which these formalities are executed, for pre- "viously to their execution neither party is bound.

"A more difficult and a more frequent case is one in "which the contract is made, not by the parties in person, "but by means of an agent, or by an instrument signed "in different places, or, lastly, through a simple corre- "spondence by letter. As to this class of cases there "is a great difference of opinion; such a case, in fact, "embraces three distinct questions, although the greater "number of writers have not discriminated them.

"i. In what place was the contract made?

"ii. What place furnishes the jurisdiction over it?

"iii. What place furnishes the local Law, to which it "is subject?

"Upon the first question I do not hesitate to answer, "that the place of the contract was the place in which

" the first letter was received, and from which an affirma-
" tive answer was sent; because there was expressed the
" agreement between the wills of the parties.

" The writer of the first letter is therefore to be con-
" sidered as having betaken himself to the residence of the
" other party, and there to have received his consent.

" This doctrine has been adopted by various writers;
" others, on the contrary, raise against it the following
" objections.

" The affirmative answer might have been, they urge,
" withdrawn before it reached its destination; or have been
" annulled by a revocatory declaration: the contract, there-
" fore, is only complete in that place in which the writer of
" the first letter received the answer, and became aware of
" the consent of the other party.

" But it cannot be admitted that we may set aside the
" true principles of Law on account of so exceptional a
" case. It most frequently happens that the two declara-
" tions succeed each other without the least difficulty of the
" kind suggested; and if such difficulty should appear, the
" question could not be decided without regard being had
" to a number of particular circumstances; so that for such
" a case the perfectly arbitrary rule, which those who oppose
" my opinion lay down, would be wholly insufficient.

" I pass on to the second question—In what place does
" the jurisdiction over the obligation exist, when the con-
" tract is effected through the medium of a correspondence
" by letter?

" It might be answered, according to analogy, in that
" place in which the first letter was received, and followed
" by an affirmative answer. But this is absolutely inadmis-
" sible. In truth, the sender of the first letter can, at the
" utmost, be only likened to a traveller; certainly not to one
" who has established a permanent residence at the domicil
" of the other party: he has not therefore submitted himself
" to the jurisdiction of that place.

" A contract made through the medium of a correspon-

" dence can only, in its relation to each party, be considered " as having been made at his own domicil, and as subjected " to the special jurisdiction which appertains to every obli- " gation considered in and by itself; if, nevertheless, the " contract specified the place of its performance, this speci- " fication would determine the jurisdiction over the obliga- " tion.

" The particular nature and exigencies of a contract " effected by Promissory notes or Bills of exchange intro- " duce important modifications of these principles. Thus " in that law of Prussia, which was the means of bringing " about the new law on Promissory notes and Bills of ex- " change throughout Germany (*i*), it was provided that not " only did the place of payment and of domicil determine " the jurisdiction, but that every party liable upon the Pro- " missory note or Bill of exchange might be cited before " that tribunal in which an action upon the note or bill had " once been brought or founded " (*ii*).

As to the third question, Savigny is of opinion that the local Law is that of the place of performance if any be specified; if none, then each party remains subject to the Law of his own domicil (*j*).

DCCVII. The Prussian Code provides that, when a different Law prevails at each domicil as to the *form* of the contract, that Law shall be followed which best maintains the [transaction or] contract (*k*). It would be, Savigny thinks, in accordance with the spirit of this law to apply to the debt or obligation of each party the Law of his own domicil. He again excepts, on account of their peculiar

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[(*i*) As to the modern Prussian Law on bills of exchange, *vide suprà*, § dcciii. note (*b*).]

(*ii*) *Savigny, R. R.* viii. s. 371 A.

(*j*) *Ubi sup.* s. 373 A.

[(*k*) " . . . so ist die Gültigkeit der Form nach den Gesetzen " desjenigen Ortes zu beurtheilen, nach welchen das Geschäft am " besten bestehen kann." Theil I. Tit. v. § 113; *suprà*, § dcc. note (*i*).]

character, notes and bills from the application of this principle (*kk*).

DCCVIII. It has been already observed (*l*) that Grotius (*ll*), speaking of a "pactio inter absentes per literas," has said, "talia enim pacta solo *jure naturæ* reguntur." Savigny regrets that writers who maintain this opinion have not stated in what treatise of Natural Law directions upon the subject are to be found.

DCCIX. Among the *immediate effects* of the contract Fœlix includes the delivery of the thing sold, the payment of the price, the actions of buyer and seller, the rights of rescinding or dissolving the contract for whatever legal cause (*m*).

DCCX. So also the obligation of the seller to bear the loss of the thing sold, occasioned by his *mora*; and Demangeat adds, the obligation of the buyer to pay the price, notwithstanding the loss of the thing sold, when that loss has not been caused by the act or fault of the seller, the obligation to pay interest and all incidents connected with it, but not of damage,—the question whether the obligation be real or personal—whether the obligors are singly or jointly responsible, the question of acquittal or discharge of the obligation.

DCCXI. Of these *consequences* and *effects* of the contract, the following principally have been the subjects of discussion in the English and United States Courts.

DCCXII. There is a question as to what Law governs *the repayment of advances* made by a merchant in one State at the request of a merchant resident in another (*mm*).

(*kk*) *R. R.* viii. s. 373 A; *et vide infrà*, chapter xlii.

(*l*) *Vide suprà*, § dcc.; *et vide Massé*, ed. 1874, liv. v. tit. i. ch. vi. ss. 1, 5, De la correspondance.

(*ll*) *De J. B. ac P.* lib. ii. c. xi. § v. 3. *Savigny, ubi sup.*

See, too, *Hertius, De commeatu literarum*, §§ 16-19 (*Comm.* vol. i. pp. 243, 244).

[(*m*) *Fœlix*, liv. ii. tit. i. s. 109.

(*mm*) *Cf. suprà*, §§ dcxcvii. dcxcviii.]

The United States Courts have holden, that the undertaking of this contract is to replace the advance at the place in which it is actually made, and therefore the merchant who makes the advance is entitled to have it replaced there, and to receive interest according to the Law of that place (*n*). So the United States Courts have also decided, that where a proposal to purchase goods is made by letter sent from one State to another State, and is assented to in the latter State, the contract of sale is made in the latter State (*nn*).

It is of course competent to the contracting parties to stipulate that the advance shall be replaced and the interest paid in some other place, or according to the Law of some other place.

So if a security for a debt be given by a merchant in one State at the request of a merchant in another, the Law of the place in which the security is given governs the contract (*o*).

DCCXIII. On the same principle as that mentioned in the last paragraph, if a loan be made in one State and security given for its repayment in another, the Law of the place of the loan governs the contract, for it is there that the money is covenanted to be repaid.

But again: it must be observed, that the express or implied will of the contracting parties may prevent the operation of this general rule. For instance, if the security be a mortgage, and that mortgage is to be actually executed in a foreign country, and the money paid there, that is the place of the fulfilment of the contract, and the Law of that

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(*n*) *Story*, s. 287, citing *Lanusse* v. *Barker*, 3 *Wheaton*, (*Supreme Court*) *Rep.* p. 101; *Grant* v. *Healey*, 3 *Sumner's Circuit Ct. Rep.* p. 523, [referred to *suprà*, § dcxcvii.; and *contrà*, *Ballister* v. *Hamilton*, 3 *Louisiana Annual Rep.* p. 401.] Story also cites *Hertii Opera*, tom. i. *De collisione legum*, § 4, num. 55, but no English case.

(*nn*) *Story*, *ubi sup.* *Mc Intyre* v. *Parks*, 3 *Metcalf Rep.* p. 207.

(*o*) *Story*, *ubi sup.* [and cf. s. 320 *a*.] *Boyle* v. *Zacharie*, 6 *Peters*, (*Supreme Ct.*) *Rep.* pp. 635, 643, 644.

place must govern, though the money has been advanced elsewhere (*p*). "Indeed," Story truly remarks, "in all "these cases we are to look to the real intentions of the "parties and their acts as expressive of them" (*q*).

DCCXIV. As to *interest*, the jurists generally speak of three kinds, viz.:

i. Interest naturally incident to the contract, either by express or implied stipulation, not founded on any wrongful act of a party (*intérêt*).

ii. Interest due for the non-performance of the contract, which the English call *damages*, and the French *dommages-intérêts*.

iii. Interest, [or "demurrage"] due from delay in the due performance of the contract, founded therefore on the wrongful act of a party, which the French call *intérêts moratoires* (*r*).

DCCXV. The interest due or accruing upon a contract is to be paid according to the Law of the place of the performance of the contract (*s*).

(*p*) *Story*, s. 287 *a*, 293 *b*; *De Wolf* v. *Johnson*, 10 *Wheaton* (*Supreme Court*), *Rep.* p. 367.

(*q*) s. 293 *b*; *Bannatyne* v. *Barrington*, 9 *Irish Chanc. Rep.* p. 406 (1859). [*Chapman* v. *Robertson*, 6 *Paige*, (*N. York Chanc.*) *Rep.* p. 627.]

(*r*) *Fœlix*, s. 109: "Un des effets ordinaires de tout acte renfermant l'engagement de payer une somme d'argent est l'obligation d'en servir les intérêts: la question de savoir si ces intérêts sont dus, et à quel taux, se règle par la loi du lieu où le contrat a été passé, ou du lieu fixé pour le payement, à moins que les parties n'aient adopté une autre loi à ce sujet." But the *dommages-intérêts*, and according to Demangeat the *intérêts moratoires*, are governed by the place of payment. *Ibid.* tome i. p. 234, note (*a*) of Demangeat's edition.

(*s*) Among English cases see *Montgomery* v. *Bridge*, 2 *Dow & Clark's Rep.* p. 297.

Fergusson v. *Fyffe*, 8 *Cl. & Finn. Rep.* pp. 121, 140.

Connor v. *Bellamont*, 2 *Atk. Rep.* p. 381.

Cash v. *Kennion*, 11 *Vesey's Rep.* p. 314.

Robinson v. *Bland*, 2 *Burr. Rep.* p. 1077.

Harvey v. *Archbold*, 3 *Barn. & C. Rep.* p. 626.

Stapleton v. *Conway*, 3 *Atk. Rep.* p. 726.

Dewar v. *Span*, 3 *Term Rep.* p. 425.

This is a proposition upon which, where the contract for the interest is *express*, the Continental, the English, and the United States lawyers are very generally agreed (*t*). The unanimity is not so complete where the interest is to be *implied* (*u*), the English and the United States lawyers holding that the same rule governs this case; while some of the Continental jurists hold that the domicil of the creditor in some cases, and the domicil of the debtor in others, should furnish the rule of Law.

The Civil Law, if the place of contract be identical with the place of performance of the contract (*x*), appears to be in favour of the English practice. The twenty-second book of the Digest, of which the title is "De usuris, et fructibus, et causis, et omnibus accessionibus, et morâ," opens with this position: "Cum judicio bonæ fidei disceptatur, "arbitrio judicis usurarum modus *ex more regionis ubi* "*contractum est* constituitur; ita tamen ut legem non "offendat" (*y*).

The transaction upon which the interest is allowed, must be one *bonæ fidei*: if it be a desire for defeating the usury laws of a state, it will be justly treated as a fraud and a nullity (*z*).

DCCXVI. It is proper to notice in this place a serious conflict in the decisions of the courts of the United States

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Arnott v. *Redfern*, 2 *Carr. & Payne*, *Rep.* p. 88, cannot be considered a correct exposition of the law.

Story, ss. 291, 293 *c*, note 3, and 296.

Kent's Comm. vol. ii. pp. 460, 461 (part v., lecture 39).

(*t*) *Story*, s. 294.

(*u*) *Ibid.* s. 295.

(*x*) Thus *John Voet* (tom. i. p. 938), *Ad Pand.* lib. xxii. t. i. s. 6, says, "Dummodo meminerimus, illum propriè locum contractûs in jure non intelligi, in quo negotium gestum est, sed in quo pecuniam ut solveret se quis obligat." He refers to *Dig.* lib. xlii. t. v. 3.

(*y*) *Dig.* lib. xxii. t. i. 1, et vide *ib.* 37: " . . . usuras venire; *eas autem, quæ in regione frequentantur, ut est in bonæ fidei judiciis constitutum.*"

(*z*) *Andrews* v. *Pond*, 13 *Peters* (*Sup. Ct. U.S.A.*), *Rep.* pp. 65, 77, 78. *Story*, s. 293 *a*.

upon this question of interest directly, but indirectly upon the whole question of Foreign Contract.

The Supreme Court of Louisiana (*a*) decided, in a case of Foreign contract, that there might be *two* places of a Contract—viz. (1) that in which it is made, *locus ubi contractus celebratus est*; (2) that in which it is to be performed, or in which the money is to be paid, *locus ubi destinata solutio est* (*b*); and the court therefore held, that if the Law of *both* places be not violated, with respect to the rate of interest, the contract for interest would be valid. The Court supported this position by referring to the writings of several foreign jurists. Story impugns both the decision itself, and the authorities on which it is founded (*c*).

i. These authorities, he contends, nowhere assert (*d*): that the validity of the same contract is not to be judged of throughout and in all its parts by one and the same Law;

ii. or that a contract is valid notwithstanding that it neither complies with the Law of the place where it was made, nor the Law of the place where it is to be performed.

iii. [He contends—That]
the passages cited by the Court from jurists are either those in which they were considering the form of the contract;

iv. or the [formalities, solemnities, and] modes of execution, when the places of making and performing happened to be identical;

v. or the interpretation and extent of contracts generally;

(*a*) *Story*, s. 298.

Depau v. *Humphreys*, 8 *Martin*, (*Louisiana*) *Rep.* New Series, p. 1; sustained in *Chapman* v. *Robertson*, 6 *Paige* (*N. Y. Chanc.*), *Rep.* pp. 627, 634. But see *Van Schaick* v. *Edwards*, 2 *Johnson*, *Cases in Sup. Ct. of New York*, p. 355.

[(*b*) *Vide suprà*, § dclxx.]

(*c*) *Story*, s. 298 to s. 304 [concluding by a reference to the decision of the Supreme Court of the U.S.A. in *Andrews* v. *Pond*, 13 *Peters Sup. Ct. Rep.* p. 65.]

(*d*) *Ibid.* s. 299 *a*.

vi. or the rule, where the contract is made in one place, [and is to be performed in another.]

vii. That several of those jurists expressly admit that, where the contract is made in one place, and is to be performed in another, the latter is the *locus contractûs*, and furnishes the rule in all respects except as to the [formalities, solemnities,] and modes of execution (*dd*).

viii. That they all agree, that as to payment or performance the place of performance is to govern, and that interest is but an incident or accessory to the principal (*e*).

ix. That the subject of interest is expressly treated of by those jurists, and without any exception as to the application of the general rule (*ee*).

The learned writer and judge examines the positions of Alexander, Burgundus, Everhardus, Christinæus, Gregorio Lopez, Dumoulin (Molinæus), Boullenois, Paul Voet, John Voet, Huberus, and the famous passage in the great civilian Bartolus, which is in fact the parent of all commentaries upon the Conflict of laws, and contends that the result of his examination justifies the positions which have been just mentioned.

The English Courts would probably extend the doctrine laid down by Lord Mansfield (*f*), that the place of payment furnished the Law of the contract, to interest as well as principal, and would therefore support Story's opinion, and not the judgment of the Court of Louisiana.

DCCXVII. The American Chancellor, Kent, agreeing with the decisions of Lord Hardwicke (*ff*), sums up the Law on this subject in these words:—

(*dd*) *Story*, s. 301 *a*.

[(*e*) *Ibid.* s. 301 *b*.

(*ee*) *Ibid.* s. 301 *c*.]

(*f*) *Vide suprà*, §§ dcxciii., dcxciv.; *Robinson* v. *Bland*, 2 *Burr. Rep.* p. 1077.

(*ff*) *Connor* v. *Bellamont*, 2 *Atk. Rep.* p. 381.

Stapleton v. *Conway*, 3 *Atk. Rep.* p. 726; 1 *Vesey sen. Rep.* p. 427; *vide Dewar* v. *Span*, 3 *Term Rep.* p. 425.

" The Law of the place where the contract is made, is " to determine the rate of interest, when the contract speci- " fically gives interest; and this will be the case, though " the loan be secured by a mortgage on land in another " State, unless there be circumstances to show that the " parties had in view the laws of the latter place in respect " to interest. When that is the case, the rate of interest " of the place of payment is to govern " (*g*).

Another instance, if another were wanting, of the ambiguity and impropriety of the expression *lex loci contractûs* when used, without explanation, to convey the true rule upon this matter of Foreign Contracts.

The language of Paul Voet (*h*) upon this matter is worthy of attention: " Ne tamen hîc oriatur confusio, " *locum contractûs duplicem* facio, *alium ubi fit*, de quo jam " dictum, *alium in quem destinata solutio*. Illum locum " verum, hunc fictum, appellat *Salicet* (in l. I *Cod.* de Summ. " Trin. n. 4). Uterque tamen rectè locus dicitur contractûs, " etiam secundum leges civiles, licet postremus aliquid " fictionis contineat. Hinc ratione effectûs et complementi " ipsius contractûs, spectatur ille locus in quem destinata " est solutio; id quod ad *modum*, *mensuram*, *usuras*, et *neg-* " *ligentiam*, et *moram* post contractum initum accedentem, " referendum est."

(*g*) *Kent's Comm.* vol. ii. p. 460 (part v., lecture 39).

(*h*) *De Statut. eorumque concursu*, sect. ix. c. ii. nn. 11, 12, cited by Rocco, lib. iii. cap. viii. p. 344.

CHAPTER XXXVII.

THIRD DIVISION—MEDIATE EFFECTS OR ACCIDENTAL CONSEQUENCES OF CONTRACTS—DAMAGES—CURRENCY—STORY'S COLLATERAL INCIDENTS, ARISING BY, (1) OPERATION OF LAW, (2) ACT OF THE PARTIES—LIENS, PRIORITY OF—LIABILITY OF PARTNERS.

DCCXVIII. 3. We have now to consider the *third* division of the subject—viz.: The *Mediate effects* and *accidental consequences* of Contracts (*a*).

"We have called," says Rocco (*b*), "the accidental "consequences of contracts, those which neither mediately "nor immediately are derived from them, but which take "their origin from facts subsequent to the contracts themselves; from circumstances which intervene and affect "the status and the relation in which the contracts have "placed the parties. Between these consequences and "those discussed in the last chapter (*c*) there are grave "distinctions. The former, when the contract is made in "our kingdom, are governed by our laws; the latter are "subject to the laws of the place in which the fact which "produced them happened."

These accidental consequences are called "*suites*" by Foelix, as distinguished from "*effets*" (*d*).

(*a*) *Vide suprà*, § dclxviii.

(*b*) Lib. iii. cap. viii. p. 340.

(*c*) Immediate and mediate [consequences, discussed in *Rocco*, lib. iii. cap. vii.]

[(*d*) "Il ne faut pas confondre les effets des contrats avec les suites accidentelles qu'ils peuvent engendrer."] *Foelix*, liv. ii. tit. i. s. 109.

DCCXIX. One of the most important of these *accidental consequences* of a contract is the right to damages (*dommages-intérêts*, and *intérêts moratoires*) arising out of delay (*de morâ, la demeure dans l'exécution*) in the fulfilment of it. Story (*dd*) is of opinion that the rule, as to the Law which shall govern the assessment of damages, and determine their rate, is analogous to the rule of Law respecting interest which has been just discussed.

Thus the United States Courts have decided, that if a note be made in a foreign country, for the payment of a certain sum in sugar at a valuation, and there be a breach of the contract, the Law of the place governs the assessment of the damages (*e*).

The same principle is applied in fixing the rate of damages for dishonoured bills of exchange (*f*).

DCCXX. The right to damages arises also from wrong done to property, that is, in this branch of Private International Law, to personal property, or *ex delicto*, perhaps more properly *ex maleficio*. Thus, if a ship in foreign or colonial waters be wrongfully seized or appropriated, the interest of that locality will be allowed by way of damages against the wrongdoer (*g*).

DCCXXI. A question (*h*) often mooted, and not very satisfactorily or consistently settled either by the English or the United States tribunals, arises with respect to the value of the *currency* by which the amount of a debt, which has been contracted in one country and is sued for in another, is to be ascertained.

(*dd*) *Story, Conflict of Laws*, s. 307.

(*e*) *Ibid.*

Courtois v. *Carpentier*, 1 *Wash. Circuit Rep.* p. 376.

(*f*) *Slacum* v. *Pomery*, 6 *Cranch*, (*Supreme Court U.S.A.*) *Rep.* p. 221.

Hazlehurst v. *Kean*, 4 *Yeates*, *Pennsylvania Rep.* p. 19.

(*g*) *Story*, s. 307. *Ekins* v. *East India Company*, 1 *Peere Williams*, *Rep.* p. 395.

Consequa v. *Willings*, *Peters*, *Circuit Rep.* pp. 225, 301.

(*h*) *Story*, s. 308 to s. 313 *b*.

The following predicaments appear to embrace the cases which arise under this head:

(1.) Where the par value [or rate of exchange] between the currencies of the two countries is nominal or established by Law.

(2.) Where there is no established par.

(3.) Where the debt has been contracted to be paid in a particular specified coin.

(4.) Where the currency, between the time when the debt was contracted or became due, and the time of actual payment, has suffered a depreciation in value.

DCCXXII. With respect to these four predicaments there are two general propositions, the latter being indeed a necessary conclusion from the former, which applies to them all.

First, the primary consideration in all cases is, in what place was the money, according to the original contract, payable; for the creditor, in whatever place he may sue, is entitled to have an amount equal to what he must pay, in order to remit it to the place in which it is payable (*i*).

This rule is well expressed by the two Voets (*k*). Paul Voet says, "Quid si in specie de nummorum aut redituum "solutione difficultas incidat, si forte valor sit immutatus; "an spectabitur loci valor, ubi contractus erat celebratus, "an loci in quem destinata erat solutio? Respondeo, ex "generali regulâ spectandum esse *loci statutum, in quem* "*destinata erat solutio*" (*l*).

John Voet says, "Si major alibi, alibi minor, eorundem "nummorum valor sit, in solutione faciendâ non tam spec- "tanda potestas pecuniæ, quæ est in loco in quo contractus "celebratus est, quam potius quæ obtinet in regione illâ in "quâ *contractûs implementum* faciendum est" (*m*).

(*i*) *Story*, s. 310.

(*k*) Story (ss. 309, 310) cites these authorities in his notes.

(*l*) *De Stat.* sect. ix. c. ii. § 15.

(*m*) *Ad Pandect.* lib. xii. t. i. s. 25.

The second general proposition flows as a natural conclusion from that which has just been stated—viz. That the creditor is entitled to receive, in the currency of the state in which the suit is brought, the sum to which he is entitled in the state in which the debt is payable, a sum calculated therefore by the real, and not the nominal, par of exchange (*n*).

This is the doctrine generally adopted by continental jurists. With respect to the third predicament—namely, where the Contract is to be paid in a particular *specified coin*—Story (*o*) is of opinion that not the mere bullion value, but the mint value, of the coin in the state in which the coin is issued, furnishes the proper standard, because it is referred to by the parties by its descriptive name as coin.

DCCXXIII. It unfortunately happens, that the decisions of the tribunals in England and in the United States are by no means uniform; they are indeed inconsistent both from a national and an international point of view.

Story goes so far as to pronounce that "there is an "irreconcileable difference in some of the authorities on "this subject" (*p*). It is probable that the increased and happily increasing knowledge both of the civil and of foreign Law in both states, may lead to judgments settled on the sound principles of general jurisprudence (*q*).

(*n*) *Story*, s. 309. *Cash* v. *Kennion*, 11 *Vesey*, *Rep.* p. 314 (Lord Eldon, 1805).

(*o*) s. 309.

(*p*) s. 311 *a*.

(*q*) The English cases are *Ekins* v. *East India Company*, 1 *Peere Williams*, *Rep.* p. 395 (Lord Chancellor Cowper, 1717).

Delegal v. *Naylor*, 7 *Bingham*, *Rep.* p. 460.

Scott v. *Bevan*, 2 *Barn. & Adolphus*, *Rep.* p. 78 (Lord Tenterden C. J., 1831).

Stapleton v. *Conway*, 1 *Vesey sen. Rep.* p. 427 (Lord Chancellor Hardwicke, 1750).

Bourke v. *Ricketts*, 10 *Vesey*, *Rep.* p. 330 (Sir W. Grant, 1804).

Saunders v. *Drake*, 2 *Atk. Rep.* p. 465 (Lord Chancellor Hardwicke, 1742).

Cash v. *Kennion*, 11 *Vesey*, *Rep.* p. 314.

DCCXXIV. The fourth predicament relates to the *depreciation of money* between the time when the debt was contracted or due, and the time when it is actually paid; *Nobilissima quæstio*, as it has been not improperly designated (*r*).

This question may present itself in two very different forms:

i. As a case of international Law arising *ex delicto* of a wrongdoer, whether a state or an individual.

ii. As a case of international Law arising out of a Contract between individuals, the subjects of or domiciled in different states, or from the dispositions of a unilateral act, such as a will or deed executed by an individual who is a subject of or domiciled in one state, which affects the rights of an individual who is a member of or domiciled in another state.

DCCXXV. As to the case of the wrongdoer, it has no analogy, as Sir William Grant observed (*s*), to the case of creditor or debtor; the obligation on the wrongdoer, be he a government or an individual, is to undo the wrong act and put the party into the same situation as if he had never done it. So also Sir W. Grant, quoting *The case of mixed money*, reported by Sir John Davies, says: "Two cases were "put by the judges who were called to the assistance of "the Privy Council, although they were not positively and "formally resolved; . . . if a man upon marriage receive "1,000*l.* as a portion with his wife, paid in silver money, "and the marriage is dissolved *causâ precontractûs*, so that "the portion is to be restored, it must be restored in equal "good silver money, though the state shall have depreciated "the currency in the meantime. So, if a man recover

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Cockerell v. *Barber*, 16 *Vesey Rep.* p. 461 (Lord Eldon, 1809 10). Three decisions reported in 1 *Eq. Cases Abridg.* pp. 288, 289.

(*r*) *Vinnius ad Instit.* lib. iii. tit. xv. n. 12.

(*s*) *Pilkington* v. *Commissioners for Claims on France*, 2 *Knapp's Privy Council Reports*, p. 7. This is the leading case on this subject.

"100*l.* damages, and he levies that in good silver money, "and that judgment is afterwards reversed, by which the "party is put to restore back all he has received, the "judgment-creditor cannot liberate himself by merely re- "storing 100*l.* in the debased currency of the time, but he "must give the very same currency that he had received." And, as Sir W. Grant observes: "That proceeds upon the "principle, that if the act is to be undone, it must be "completely undone, and the party is to be restored to the "situation in which he was at the time the act to be undone "took place" (*u*).

In the case of the Contract or other civil act of individuals, the opinions of jurists of all states are much divided. Some, among whom are the great names of Dumoulin, Hotomannus, and Donellus, fix upon the time of the making the contract (*tempus contractûs*) as governing the question of the value. Others, among whom are Bartolus, Baldus, De Castro, and the favourite authority on this subject, Vinnius, fix upon the time of payment (*tempus solutionis*). Vinnius, however, sums up judicially the case as follows: "Siquidem neutri contrahentium injuriam fieri volumus, "ita definiendum videtur, ut si *bonitas monetæ intrinseca* "mutata sit, tempus *contractûs*, si *extrinseca*, id est valor "imposititius, tempus *solutionis* in solutione faciendâ, "spectari debeat" (*v*). Or, as he is happily paraphrased by Sir W. Grant in the leading case above referred to:

"He takes the distinction, that if, between the time of "contracting the debt and the time of its payment, the cur- "rency of the country is depreciated by the State, that is "to say, lowered in its intrinsic goodness, as if there were "a greater proportion of alloy put into a guinea or a shilling, "the debtor should not liberate himself by paying the "nominal amount of his debt in the debased money; that "is, he may pay in the debased money, being the current

(*u*) *Ibid.* pp. 20, 21.
(*v*) *Vinnius ad Instit.* lib. iii. tit. xv. n. 12.

"coin, but he must pay so much more, as would make it equal "to the sum he borrowed. But, he says, if the nominal value "of the currency, leaving it unadulterated, were to be in- "creased, as if they were to make the guinea pass for 30*s.*, "the debtor may liberate himself from a debt of 1*l.* 10*s.* by "paying a guinea, although he had borrowed the guinea "when it was but worth 21*s.*" (*y*).

DCCXXVI. It is to be observed, however, that Vinnius accompanies his statement of the Law on this subject with the caution, invariably applicable to all questions of foreign contract, "Intellige si nihil de eâ re *expressè dictum* sit, "neque *mora* intervenerit."

DCCXXVII. Sir John Davies, in his report of "*Le* "*case de mixt monies*," records the opinion of the judges upon the following point (*z*): A bond was given in London for the payment of "100*l.* sterling, current and lawful money "of England," to be paid [at the tomb of Earl Strongbow in Christ-Church,] Dublin, Ireland; and between the time of giving the bond, and its becoming due, Queen Elizabeth, by proclamation, recalled the existing currency in Ireland, and issued a new debased coinage (called "mixed money"), declaring it to be the lawful currency in Ireland. A tender was made in this debased coin, or mixed coin, in Dublin, in payment of the bond. The question before the Privy Council of Ireland was, whether the tender was good [or whether the debtor "should be compelled to pay the said "one hundred pounds in other or better coin than in the "mixed money, according to the rate and valuation of it, "at the time of the tender."] The court held the tender good: first, because the mixed money was current lawful of England, Ireland being within the sovereignty of the British Crown, *before the day of payment* (*a*); and secondly,

(*y*) 2 *Knapp's P. C. Rep.* p. 19.

(*z*) *Story*, s. 313, note 2.

(*a*) *Sir John Davies' Reports*, p. 73, 6th Resolution. This is no noticed by Story in his abstract of the opinion, an abstract which I have generally followed.

because the payment being appointed in Dublin (*le lieu de payment*), it could be made in no other currency than the existing currency of Ireland, which was the mixed money.

Story (*b*) observes upon this statement, that "the court "do not seem to have considered, that the true value of the "English current money might, if that was required by the "bond, have been paid in Irish currency, though debased, "by adding so much more as would bring it to the par. "And it is extremely difficult to conceive, how a payment of "current lawful money of England could be interpreted to "mean current or lawful money of Ireland, when the cur-"rency of each kingdom was different, and the royal pro-"clamation made a distinction between them, the mixed "money being declared the lawful currency of Ireland "only."—This is a very fair observation; but it is not equally fair to say,—"that perhaps the desire to yield to "the royal prerogative of the Queen a submissive obedi-"ence, as to all payments in Ireland, may account for a "decision so little consonant with the principles of Law "in modern times."

DCCXXVIII. Story, however, with due submission to so high an authority be it said, does not appear to me to have stated this case with sufficient fulness; he does not notice the argument from the expression "current (*c*) "money," namely, that these terms in a Contract referred to a *future* time, and that "verba *currentis monetæ* tempus "solutionis designant." The term "current" in a Will, the judges said, would convey a different sense, because the testator in a bequest of so much current money would intend to refer *ad tempus conditi testamenti*. Nor does there appear to be any ground for the assertion, that the judges were influenced by a servile submission to the royal prerogative. The decision turned in some measure

(*b*) *Ubi sup.*

(*c*) ["for all other money was cried down and made bullion by the proclamation aforesaid" in Ireland, "and this money only established."] *Sir J. Davies' Rep.* p. 76.

upon the *locus solutionis* being Dublin, though the *locus contractûs* was London (*d*).

Story cites a passage from Pothier, and states that he differs from Vinnius; he might have added, that this great jurist argues, however unconsciously, in accordance with the decision of the judges in the case of the mixed money.

Pothier, in his *Traité du Contrat de Vente* (*e*), deals with the question of a seller's reserved right to repurchase (*réméré*), and thus expresses himself: "Il nous "reste à observer à l'égard du prix, qu'il peut être rendu en "une monnaie différente de celle en laquelle il a été payé. "S'il a été payé au vendeur en or, le vendeur peut le "rendre en espèces d'argent, et *vice versâ*. Pareillement, "quoique, depuis le paiement du prix qui a été fait au "vendeur, les espèces, dans lesquelles il a été payé, "soient augmentées ou diminuées; quoiqu'elles aient été "décriées, et qu'au temps du réméré, il y en ait de "nouvelles qui soient de meilleur ou de plus mauvais aloi; "le vendeur, qui exerce le réméré, doit rendre en espèces "qui aient cours au temps auquel il exerce le réméré la "même somme ou quantité qu'il a reçue en paiement, et "rien de plus ni de moins. La raison est que, dans la "monnaie, ce ne sont pas les espèces que l'on considère, "mais seulement la somme ou valeur que le souverain a "voulu qu'elles signifiassent. *Ea materia formâ publicâ "percussa usum dominiumque non tam ex substantiâ "præbet quam ex quantitate; L.* l. ff. *de contr. empt.* Ce "ne sont pas tant les espèces que le vendeur est censé "avoir reçues, lorsque le prix lui a été payé, que la somme "ou valeur signifiée par ces espèces; et par conséquent "il doit rendre, et il lui suffit de rendre, la même somme

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[(*d*) See *Kearney* v. *King*, 2 *Barn. & Ald. Rep.* p. 301. Legal tender in the United Kingdom is now regulated by 33 Vic. c. 10 as amended by 41 & 42 Vic. c. 49, s. 86.]

(*e*) Partie v. c. ii. § 5, num. 416.

" ou valeur en des espèces qui aient cours, et qui soient " les signes autorisés par le prince pour signifier cette " valeur." And Pothier adds, " Ce principe étant certain " dans notre pratique française, il suffit de l'avoir exposé ; " *il retranche toutes les questions que les docteurs font sur* " *les changemens de monnaie.*"

DCCXXVIII.A. In the Supreme Court of the United States the question of the solution of obligation by payment of money according to the standard of currency at the time of the contracting of the obligation, or according to the standard prevailing at the time of payment, has several times undergone discussion with conflicting results. But finally it appears that a majority of the Court have holden that when the contract was one for payment of money merely, the Legal Tender Acts of the United States make a payment in notes, though of a greatly depreciated value, sufficient; but if the contract was express for the payment in coin, it must be satisfied by payment in coin and not in notes (*f*).

DCCXXIX. Under this head of *mediate effects* or accidental consequences, it may be permitted perhaps to range the following incidents of Contracts, which are treated of by Story under the head of *collateral incidents* (*g*).

They arise either by (1) operation of Law, or (2) by act of the parties; and among them may be placed:—

i. The liability of partners for partnership debts.

ii. The right of [implied warranty conferred in countries governed by the Civil Law (*gg*).]

(*f*) *Bronson* v. *Rodes*, 7 *Wallace* (*Sup. Ct. U.S.A.*), *Rep.* p. 229; *Hepburn* v. *Griswold*, 8 *Ib.* p. 603 (1869); [overruled on one point; see] *Legal Tender Cases*, 12 *Ib.* p. 457 (1870); [*Railroad Co.* v. *Johnson*, 15 *Ib.* p. 195; and see *Kent*, vol. i. p. 254, n. 1.]

(*g*) *Story, Conflict of Laws*, ss. 322, 322 a, 322 b. These would fall under Rocco's division of *mediate consequences*, sometimes called *natural* consequences by jurists, because, as Rocco says, they do not touch the substance of the Contract, but are a natural appendage to it. See *Rocco*, lib. iii. cap. vii. pp. 329–333.

[(*gg*) *Story*, s. 264.]

iii. The right of discussion; that is, the obligation of the creditor [under Roman Law] to proceed against or *discuss* the principal debtor, if solvent, before he can attach the surety.

iv. The liens incident to a contract; *e.g.*—

a. The lien of a vendor upon lands until the purchase money be paid, [according to English Law.]

[*β*. The like lien upon goods according to the Roman, and some modern, systems of Law.]

γ. The right of stoppage *in transitu* (*h*) in case of the insolvency of the purchaser.

δ. The lien of a bottomry bond.

ε. The lien of mariners on the ship for their wages.

ζ. The lien for priority of payment in certain obligations. This question is partly considered in some subsequent observations on the *transfer* of obligations.

DCCXXX. Story pronounces his opinion that, with regard to these and the like cases, wherever the liability, the right, the lien, or the privilege is created by the Law of the place in which the contract is made, "it will gene- "rally, although not universally, be respected and enforced "[in all places where the property is found, or where the "right can be beneficially enforced by the *lex fori*."] (*i*)

It is also said by the same high authority, that the converse of this proposition is true, that if the lien or privilege does not exist in the place in which the contract is made, it will not be allowed in the place in which it is performed, or in which a suit is brought to enforce its per-

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(*h*) *Vide post*, chapter xli.

(*i*) *Story*, s. 322 *b* [citing 3 *Burge*, *Comment.* (Part ii. ch. 20) vol. iii. pp. 770, 771, 779.]

Carroll v. *Waters*, 9 *Martin*, (*Louisiana*) *Rep.* p. 500.

But as regards mortgages of ships, the Courts of Louisiana have, in aparent violation of the comity of nations, decided otherwise. See the English cases of *Simpson* v. *Fogo* (1 *John. & H.* p. 18, 29 *L. J. Ch.* p. 657; 1 *Hem. & M.* p. 195, 32 *L. J. Ch.* p. 249), and *Liverpool Marine Credit Co.* v. *Hunter* (*L. R.* 3 *Ch. App.* p. 479), referred to later on.

formance, although the Law of that place would sustain it (*k*).

Foreign jurists, however, though generally agreeing in this doctrine with respect to liens, not unfrequently distinguish between their effects upon moveable and immoveable property; governing the liens on the latter *lege rei sitæ*, and the former *lege loci contractûs* (*l*).

DCCXXXI. The recognition [by foreign countries] of the lien does not imply the recognition of its title to priority over other liens [justly acquired in, and under the laws of such foreign countries, merely] because such right of priority attached to the lien in the place of its creation (*ll*). The doctrine of the United States Courts is, that "the "right of priority forms no part of the contract itself. It is "extrinsic, and it is rather a personal privilege dependent "on the Law of the place where the property lies, and "where the court sits which is to decide the cause" (*m*).

Some eminent foreign jurists hold this doctrine without qualification; others take distinctions as to the *domicil* of the obligor or debtor, some insisting that in the case of moveables the rule of the original domicil travels with the person, some, like Rodenburgh, maintaining that if the

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(*k*) *Story, ubi sup. Whiston* v. *Stodder*, 8 *Martin*, (*Louisiana*) *Rep.* pp. 95, 134–5.

(*l*) *Story*, s. 322 *c*.

(*ll*) *Story*, s. 323.

(*m*) Chief Justice Marshall, in *Harrison* v. *Sterry*, 5 *Cranch*, (*Supreme Ct. U.S.A.*) *Rep.* at p. 298, et seq.

See too *Ogden* v. *Saunders*, 12 *Wheaton* (*Sup. Ct.*), *Rep.* at pp. 361-2.

The High Court of Admiralty has similarly decided in England, *The Union*, *Lush. Adm. Rep.* p. 128.

Thus *Hertius*: "Enimvero, quia *antelatio*" (priority) "ex jure singulari vel privilegio competit, non debet in præjudicium illius civitatis, sub quâ debitor degit et res ejus mobiles contineri censentur, extendi. Ad jura igitur domicilii debitoris, ubi fit concursus creditorum, et quo omnes cujuscunque generis lites adversus illum debitorem propter connexitatem causæ traduntur, regulariter respiciendum erit."—*De Collis. Leg.* § 4, n. 64; cited *Story*, s. 325 *b*.

domicil be changed, the Law of the new domicil operates upon the moveables in the old domicil (*n*).

But, amidst this conflict of opinions as to liens upon *moveable* property (*o*), there is a preponderance of authority in favour of the operation of the *lex rei sitæ* upon *immoveable* property (*p*); though there are not wanting dissentients from this doctrine.

It is a doctrine, however, firmly imbedded in the Law of England and of the United States.

DCCXXXII. It is a maxim which applies to all the foregoing considerations, and which is pretty generally adopted by States, that in the case of an irreconcileable conflict between rights acquired *lege loci contractûs* and those acquired *lege fori*, the former yield to the latter; that is, Comity between States gives place to the positive Law of the particular State which has judicial cognizance of the matter (*q*). This maxim has indeed been already expressed in the early part of this volume.

DCCXXXIII. According to the jurisprudence of the United States, the Law of the place where the contract is

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(*n*) *Rodenburgh*, tit. ii. c. v. § 16; cited *Story*, s. 325 *g*.

(*o*) See the authorities collected, *Story*, ss. 322 *c*–325 *n*.

(*p*) *Story*, s. 325 *o*. [*Vide infrà*, chap. xxxviii.]

(*q*) *Vide antè*, § dclxxiii.

Potter v. *Brown*, 5 *East*, *Rep.* p. 124 (Lord Ellenborough: a leading English case).

Saul v. *his Creditors*, 5 *Martin*, (*Louis.*) *Rep.* New Series, p. 569 (leading case in the United States), given in full *infrà*, Appendix I.

Kent, vol. ii. p. 461.

Story, ss. 326, 327, 327 *a*.

Huberus, *De Conflictu Legum*, Pars II. lib. i. tit. iii. § 11: "Magis est ut jus nostrum quam jus alienum servemus." — See also a very important case, decided by Mr. Justice Porter (who also decided *Saul* v. *his Creditors*)—*Ohio Insurance Company* v. *Edmondson*, 5 *Louisiana Rep.* pp. 295, 306.

[*Burge*, *Comm.* vol. iii. pp. 778, 779.]

As to conflict between *maritime policies*, *vide infrà*, § dcccxxviii., and *Story*, s. 327 *b*.

made will govern the contract as to the liability of partners and part owners [for partnership debts].

If by that Law they would be liable *in solido*, that liability will follow the debt everywhere, although by the Law of the domicil of the partnership the partners might not be liable *in solido*, but only for a proportionate share (*r*).

A remarkable illustration of this position, as will be seen hereafter, is offered in the case of bills of exchange; for the Law of some countries holds, that if the drawer was bankrupt at the time when the bill was accepted, the acceptor is discharged from his acceptance; and this consequence travels with the bill everywhere as an inseparable incident (*s*).

(*r*) *Story*, s. 322.
Ferguson v. *Flower*, 4 *Martin*, (*Louisiana*) *Rep.* New Series, p. 312.
Carroll v. *Waters*, 9 *Ib.* p. 500.
(*s*) *Pardessus*, *Droit Comm.* art. 1492; cited by Story, s. 322.

CHAPTER XXXVIII.

THE LEX LOCI CONTRACTÛS AND THE LEX REI SITÆ, CONSIDERED WITH REFERENCE (1) TO THE TRANSFER OF IMMOVEABLE PROPERTY; (2) TO SECURITIES AND LIENS UPON IMMOVEABLE PROPERTY.

DCCXXXIV. In this chapter some observations will be made upon these two questions; viz.—

1. Does the *lex loci contractûs* or the *lex rei sitæ* govern the *transfer* of immoveable property?

2. Does the *lex loci contractûs* or the *lex rei sitæ* govern as to *liens*, *hypothecs*, or *mortgages*, created in the place where the Contract is entered into, upon immoveable property situated in another State?

DCCXXXV. 1. The case of a contract respecting the *transfer* of immoveable property illustrates the variety of the rules which the foreign writers upon Private International Law consider applicable to a contract to which a foreigner is a party (*a*): they say that,

i. The capacity of the obligor to enter into the contract is determined by reference to the Law of his domicil (*b*).

ii. The like capacity of the obligee by the Law of *his* domicil.

iii. The mode of alienation or acquisition of the immoveable property is to be governed by the Law of the situation of that property (*c*).

(*a*) *Fœlix*, liv. i. tit. iii. s. 67.

Story, Conflict of Laws, ss. 363–368, 370–373.

(*b*) This, it should be remembered, may involve the discussion of the questions on the *change* of domicil.

(*c*) So *Rocco*, lib. iii. cap. vii. p. 337.

iv. The external form of the contract is to be governed by the Law of the place in which the contract is made.

It is even suggested by Fœlix, that sometimes the *interpretation* of the contract may require the application of a fifth Law.

DCCXXXVI. The Law of England, and the Law of the North American United States, require the application of the *lex rei sitæ* to all the four predicaments mentioned in the last section (*d*).

DCCXXXVII. But a distinction is to be taken between contracts to transfer property, and the contracts by which it is transferred. The former are valid if executed according to the *lex loci contractûs*; the latter require for their validity a compliance with the forms prescribed by the *lex rei sitæ*. Without this compliance the *dominium* in the property will not pass (*e*).

DCCXXXVIII. With respect to the *extent of interest* in immoveable property capable of being acquired or alienated, English and Foreign Law are pretty much in accordance. Both pronounce that the *lex rei sitæ* is alone to govern the question (*f*).

DCCXXXIX. With respect to the subject-matter, or what kind of property is to be considered immoveable, that question is also to be decided by the *lex rei sitæ* (*g*). This Law may or may not consider "moveable" identical with "personal" property; and may consider things to constitute moveable or immoveable property either ac-

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(*d*) [Cf. *Adams* v. *Clutterbuck*, *L. R.* 10 *Q. B. D.* p. 403; *Studd* v. *Cook*, *L. R.* 8 *Ap. Ca.* p. 577 (*suprà*, § dcxc.); *Hernando* v. *Sawtell*, *L. R.* 27 *Ch. D* p. 284; *Bradford* v. *Young*, *L. R.* 29 *Ch. D.* p. 617; *In re Sibeth*, *L. R.* 14 *Q. B. D.* p. 417; *Graham* v. *Massey*, *L. R.* 23 *Ch. D.* p. 743.] See *Story*, ss. 365, 424-431, [434, 435. He cites *United States* v. *Crosby*, 7 *Cranch*, *Rep.* p. 115, &c. See also *Burge*, *Comm.* vol. ii. chap. ix., and *infrà*, § dcclvi.]

(*e*) *Burge*, *Comm.* vol. i. p. 24, vol. ii. pp. 844, 845.

(*f*) *Story*, s. 445, and authorities there cited.

(*g*) *Story*, s. 447.

cording to their own nature, or according to an arbitrary rule of its own.

DCCXL. 2. As to the operation of the *lex loci contractûs* and the *lex rei sitæ* upon *securities* and *liens* upon real property. The distinction between moveable and immoveable property, its important bearing upon questions of comity, and the difficulties arising from the peculiar character of personal property in England, have been made the subject of notice in an earlier part of this work (*h*). But the reader is now referred to them on account of their connexion with a possible incident to foreign contracts involving considerations of much nicety and difficulty.

DCCXLI. A contract may be made, as in the case of a loan, in one state, and a security given for it in the shape of a *hypotheca*, a gage or mortgage, upon lands lying in another state. The question arises whether the *lex loci contractûs* or the *lex rei sitæ* is to govern this incident of the contract (*i*).

DCCXLII. It is expedient to consider the question, *first*, with reference to States the basis of whose jurisprudence is the Roman Law, and, *secondly*, with reference to the Law of England and of the United States.

DCCXLIII. The jurisprudence of foreign States on this subject is founded either upon the Roman or upon a distinct Municipal Law, or upon a recognition of some principles of the Roman Law with certain more or less important additions and exceptions introduced by the policy of the State.

(*h*) *Vide antè*, chapter xxvi.

The principal interests of a personal nature derived from landed property in England, are a *term of years*, and a *mortgage debt*. *Williams on the Law of Real Property*, ed. 1887, p. 439.

(*i*) *Story*, ss. 287 *a*, 372 *d*, 435–447, 523.

Savigny, *R. R.* viii. ss. 368, 374, 390.

Fœlix, liv. i. tit. iii. s. 67, notes.

Burge, *Comm.* vol. iii. chapter xii. *præsertim* section vi.

Rocco, lib. iii. cap. vii. p. 337.

DCCXLIV. Savigny (*k*) makes the following remarks:

i. The hypothecation, gage, or pledge (*Hypotheca* (*l*)—*Pfandrecht*—*Droit de gage*), in the system of Roman jurisprudence, appertained to the class of rights called *real* (*jura in re*), good against third parties, acquired through the intervention of a simple contract, and without delivery or act of taking possession (*m*).

ii. The contract might be tacit or implied, because [in respect of many acts connected with legal obligations it was feigned,] according to a general principle of jurisprudence, that a gage or pledge had been given as a security for a claim. The expressions ". . . tacitam con- " ventionem de invectis illatis . . . quasi id tacitè con- " venerit . . . tacitè solet conventum accipi, ut perinde " teneantur invecta et illata, ac si specialiter convenisset " . . . tacitè intelliguntur pignori esse . . . etiamsi nominatim id non convenerit," are among those in the Digest (*mm*) which illustrate this position.

iii. The Roman law made no distinction between moveable and immoveable things, as the objects of such gage (*n*).

(*k*) *Ubi sup.* s. 368, num. 4.

(*l*) Hypotheca. Pignoris jus, absque possessione rei pignori datæ, constitutum.—*Dirksen's Manuale*, p. 424, voc. Hypotheca.

(*m*) "The right," Mr. Burge observes, "which a creditor may acquire in the property of another by its being pledged to him as a security for the satisfaction of a demand which he has against the owner of that property, is under the Civil Law, and those systems which are founded on it, perfectly distinct from the *dominium*. It is called *hypotheca* or *pignus*. It is a Contract, 'quo jus in re constituitur creditori in securitatem crediti.'"—*Burge, Comm.* vol. iii. p. 161, citing *Huber. Prælect.* lib. xx. tit. i.

[(*mm*) *Dig.* lib. xx. t. ii.]

(*n*) As to the difference between *pignus* and *hypotheca*, the Institutes say (lib. iv. t. vi. 7):—

"Inter *pignus* autem et *hypothecam*, quantum ad actionem hypothecariam attinet, nihil interest; nam de quâ re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hâc appellatione continetur; sed in aliis differentia est: nam *pignoris* appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori

iv. The express as well as the tacit contract might refer, not only to particular portions of property, but to the whole estate.

DCCXLV. Savigny further remarks, that those European states which are governed, as a general rule, by the Roman Law, have, in the particular instance of gage or mortgage, made some important deviations from it. These deviations chiefly relate to the extent to which the tacit or implied gage operates; and the municipal laws of these states recognize, some a greater, some a less, number of obligations guaranteed by a fiction of a contract of hypothecation or mortgage.

DCCXLVI. Take, for instance, the following case: Two states are governed, generally speaking, by the Roman Law. In the one the rule of the Roman Law prevails, that where a bridal portion (*Brautgabe*) has been promised, it is guaranteed by the implied hypothecation of the whole property of the promissor; in the other this rule [has been abrogated]. Two inhabitants of the former state enter into a dotal or marriage contract; the promissor or obligor possesses a piece of land in the latter state; the question arises, Is this land burdened with an implied or tacit hypothecation? It may be answered negatively, on the ground that the *lex rei sitæ* must prevail. But, according to Savigny, the answer would be wrong, because the latter state acknowledges the possibility of a hypothecation through the medium of a contract alone, and even of a tacit contract alone. Whether, in the case suggested, there be or be not such a contract, is a question of fact which can only be decided by the *lex loci contractûs*. But, according to [a fiction of that law, the dotal contract is guaranteed by an express hypothecation of the whole property of the promissor; and this piece of land is a portion of that property; it is therefore included in

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maximè si mobilis sit: at eam quæ sine traditione *nudâ conventione* tenetur, propriè *hypothecæ* appellatione contineri dicimus."

the hypothecation]. But, if the dotal contract had been completed in the latter state, neither the piece of land nor the rest of the property of the promissor would have been so hypothecated (*nn*).

DCCXLVII. There exists, however, a much greater discrepancy between states which have adopted in general the Roman Law of hypothecation, and those which, like Prussia, have built this law upon an entirely new foundation.

DCCXLVIII. The Law of Prussia does not admit that a simple contract can establish a right of hypothecation as a right affecting [specific] property, which it calls a *real right* (*dingliches Recht—droit réel*). The Law of Prussia also makes a distinction between moveable and immoveable property. In the case of immoveables, a *real right* [or specific charge] can only be created by an [entry (*Eintragung*)] in the register of hypothecations (*Hypothekenbuch, Grundbuch*). A contract relating to the registration of a particular piece or portion of land confers a title by means of which this registration can be demanded, but a general contract of hypothecation over the whole of a property does not support a demand for a registration of particular portions of land. In the case of moveables, a right [of specific hypothecation arises only from the delivery or *tradition* (*Uebergabe*)] of the thing: a contract relating to the hypothecation of definite particular things founds a claim for the delivery of those things (*o*).

[(*nn*) *Savigny, R. R.* viii. s. 368, num. 4.]

[(*o*) Prussian Code, Theil I. Tit. xx. Abschnitt i. ; *vide* §§ 1, 2, 7-10, 109-112, 402, 403, 411, 412.

§ 1, headed "Begriff," runs thus :—"Das dingliche Recht, welches Jemandem auf eine fremde Sache zur Sicherheit seiner Forderung eingeräumt worden, und vermöge dessen er seine Befriedigung, selbst aus der Substanz dieser Sache verlangen kann, wird ein Unterpfandsrecht genannt."

Further enactments respecting mortgages on land in Prussia are contained in the Law of 5th of May, 1872.]

But when a contract of hypothecation, tacit or express, takes place in a state which is governed by the Roman Law, it will not, *per se*, extend to the moveable property of a debtor in Prussia; at the most it can only operate as a claim to have such property, through the medium of registration or delivery, subjected, and then only under certain specified conditions, to the hypothecation. If, on the other hand, a contract of hypothecation takes place in Prussia, having for its object either individual things or a whole property, and the debtor possesses property in a state governed by the Roman Law, there is no reason why this property should not be deemed validly hypothecated, inasmuch as the Roman Law does not make the validity of the hypothecation dependent either upon the *lex loci contractûs*, or upon the *domicilium* of the hypothecator; in this case, therefore, the *lex rei sitæ* may and ought to be unreservedly applied (*oo*).

DCCXLIX. The following case [though relating only to moveable property, is worthy of consideration:] In a state governed by the Roman Law a moveable is validly hypothecated by a contract, express or tacit; afterwards this moveable is brought into Prussia. Does the lien of hypothecation continue to affect it, so as to enable the pawnee or mortgagee to bring an action against its possessor, whether the pawner, or mortgagor, or a third person? Can the pawnee or mortgagee dispose of it, if he becomes possessed of it by some accident and without delivery? The plausible answer is in the affirmative, because it may be said that a right to a thing once acquired is not affected by the removal of that thing from one place to another. But this answer, Savigny says, would be wrong. It is not, in truth, a question as to one and the same right of hypothecation which may be acquired in different ways in different states, just as property acquired in one state by delivery, in another by contract, is universally recognized as property. The right of hypothecation acquired by mere

(*oo*) *Savigny, ubi sup.*

contract is altogether a different institution or creature of law from that which can only be acquired by delivery; the two have nothing in common but their name and object. The pawnee or mortgagee, therefore, who, in the case suggested, sought to exercise his right of hypothecation in Prussia, would be calling upon that state to enforce an institution of law which it does not recognize, and this is a proceeding in principle inadmissible (*p*). But, on the other hand, the pawnee or mortgagee in Prussia, who has become possessed by delivery of a hypothecated moveable, can enforce his right in a state governed by the Roman Law, inasmuch as he has united in himself all the conditions of hypothecation required for its validity by the law of that state.

DCCL. The French jurisprudence upon the effect of foreign hypothecations is, as at present actually administered, unfavourable to their operation upon property in France; but the decisions of the French tribunals on this subject do not appear to be approved by the jurists of that state, whose influence upon the future decisions of the tribunals seems to be scarcely if at all less than that of mere judicial precedents (*q*).

Fœlix, in an essay written, in 1842, for the *Revue Etrangère et Française*, admitted the right of hypothecation of the wife and the minor over property in a foreign state, subject to these conditions: (i.) That the *lex situs* recognizes this kind of hypothecation. (ii.) That the personal law of the wife or minor also recognizes it. (iii.) That there exists a treaty between the two states recognizing this right of hypothecation in the case of a foreign wife or minor. In his later and greater work, *Traité du Droit International privé*, Fœlix makes no mention of the third condition, the

(*p*) *Vide suprà* (§ cccxcix.); remarks as to the erroneous doctrine that a State, which does not recognize among its legal institutions a divorce *a mensâ et toro*, may be required to enforce it in the case of foreigners married in a State which does recognize it.

(*q*) *Vide antè*, § cccxlviii.

necessity of which he has abandoned, according to the opinion of his latest editor, Demangeat. This learned person observes that the French Law concedes to foreigners all the civil rights (*droits privés*) of Frenchmen, with certain exceptions formally specified in the text of the *Code Civil*; and he laments, as a deplorable interpretation of the eleventh article of that Code, a judicial decision that the *hypothèque légale* is one of the civil rights which appertain exclusively to Frenchmen.

As to the general question whether a hypothecation recognized by the personal law ought to be equally recognized by the *lex situs*, Fœlix answers in the affirmative. Demangeat refuses to go this length; he is of opinion that the *lex situs* must be considered to some extent: "c'est au "statut réel à déterminer le mode de conservation et le "rang du droit d'hypothèque." At the same time he agrees with Savigny, and thinks that a French wife ought to be allowed a right of hypothecation over the property of her husband in a foreign state, [even when the Law of that state would not give such right to married women, provided that the aforesaid Law] recognize that species of *real right*, [(*droit réel*)] which is called hypothecation (*qq*).

DCCLI. *Secondly*,—with reference to states in which the jurisprudence of England prevails as to the Law which governs liens on real property.

Little can be added to the authorities collected by Story and Burge on this subject. And first, with respect to a [loan made in one country, and secured by mortgage of property in another country.] The English decisions, as Story points out, have been, that "the Law of the place "where the loan is made is to govern, for the mere taking "of a foreign security does not necessarily alter the locality "of the contract." It by no means necessarily follows from the taking of such security, that where it is taken the contract

(*qq*) *Fœlix*, liv. i. tit. iii. s. 67, note (*a*). (Ed. Demangeat, tome i. pp. 136-8, note (*a*).)

is to be fulfilled. "The legal fulfilment of a contract of loan "on the part of the bondsman is repayment of the money;" the security is but the means of ensuring what has been contracted for—that is, to pay where he borrows, unless another place of payment be expressly designated by the contract. "But," Story continues, "if the mortgage is "actually to be executed in a foreign country, and the "money is to be paid there, the loan will be deemed to be "there completed, although the money may have been "actually advanced elsewhere" (*r*).

DCCLII. Story also refers to the following case as, though somewhat different in its circumstances, being yet illustrative of the general principle—a case which occurred formerly in England (*rr*): By a settlement made upon the marriage of A. in England, a term of 500 years was created upon estates in Ireland in trust to raise 12,000*l.* for the portions of daughters. The parties to the settlement resided in England, and a question afterwards arose whether the 12,000*l.*, charged on the term of years, should be paid in England without any abatement or deduction for the rate of exchange between Ireland and England. It was decided that the portion ought to be paid in England, where the contract was made and the parties resided, and not in Ireland, where the lands lay which were charged with the payment, for it was a sum in gross, and not a rent issuing out of the land (*s*).

DCCLIII. In the case of *Waterhouse* v. *Stansfield*, the

(*r*) *Story*, s. 287 *a* [a section treating primarily of the Law governing the contract, as a contract of loan. It is clear from the authorities cited *infrà*, § dccliv., that where the security consists of land or immoveable property, such security will fall, with respect to all questions of validity, realization, and priority, under the *lex loci rei sitæ*.]

[(*rr*) *Phipps* v. *Earl of Anglesea*, 1 *Peere Williams, Rep.* p. 696, cited in *Viner's Abridgment*, vol. v. p. 209, *voc.* "Condition," Q *b*.]

(*s*) *Story*, s. 288. See *De Wolf* v. *Johnson*, 10 *Wheaton* (*Supreme Ct. U.S.A.*), *Rep.* p. 367.

difficult question arising out of a debt secured by a mortgage on foreign land underwent some discussion. In that case a mortgagor resident in this country mortgaged, by deed executed in England, to mortgagees also resident here, real estate in Demerara; and before the mortgagees completed their title to the mortgaged property according to the laws of Demerara, the mortgagor became bankrupt, and his assignees in England sold the property and received the proceeds. The question was, whether the rights of the contracting parties had ceased to be governed by the Law of Demerara, the *lex loci rei sitæ*, and must be governed by the Law of this country, the *lex loci contractûs*. Vice-Chancellor (afterwards Lord Justice) Turner made the following, among other, observations :—

"Upon the argument of this claim several points were "made on the part of the plaintiffs. First, that the "defendants, the assignees, are bound by all the equities "by which the bankrupt was bound; and that the court, "finding them in possession of the proceeds of an estate, "which by contract with the bankrupt was bound in "favour of the plaintiffs, will give effect to the contract "against those proceeds.

. . . . . .

"The case of *Ex parte Pollard* (*t*) was cited upon the "first point; but in that case the Law of Scotland pre-"sented no impediment to the mortgage being completed; "the contract bound the bankrupt, and therefore his "assignees, and there was no impediment to its comple-"tion; but in this case the contract indeed may bind the "bankrupt and the assignees, and yet, by the Law of "Demerara, may not have been capable of being fulfilled. "The two cases, therefore, are widely different; and I

(*t*) *Ex parte Pollard, re Courtney*, 1 *Montague & Chitty, Rep.* p. 239, and 4 *Deacon, Rep.* p. 27 : reversing s. c. 3 *Montague & Ayrton, Rep.* p. 340 ; 2 *Deacon, Rep.* p. 367.

Martin v. *Martin*, 2 *Russ. & Mylne, Rep.* p. 507.

"cannot hold this case to be governed by *Ex parte Pollard.*

"If it can be decided in favour of the plaintiffs, without some further inquiry, it must, I think, be upon the more broad and general ground, that the property having been sold, and the proceeds of the sale received by the defendants, the assignees, the rights of the parties have ceased to be governed by the Law of Demerara, the *lex loci rei sitæ*, and must be governed by the Law of this country, the *lex loci contractûs.* No authority has been cited, nor have I been able to find any, which touches this point; but I think it must depend upon the question, how far the *lex loci rei sitæ* extends. If it regulates not merely the disposition of the estate itself, but also the disposition of the proceeds of the estate, it cannot, I think, be permitted that a different Law should intervene and defeat those regulations. The interest in the proceeds is in substance and effect an interest in the estate itself, and no rule is more universal than that the *lex loci rei sitæ* governs the disposition of the estate. If the *lex loci rei sitæ* only permits the alienation of the estate upon the terms of the proceeds being applied in a particular manner, this is a restraint upon the alienation; and there is no doubt that the restraints which may be put upon alienation must in all cases be governed by the *lex loci rei sitæ.* Again, how could a contract to dispose of the proceeds of an estate in a manner contrary to that prescribed by the *lex loci rei sitæ* be enforced? I cannot, therefore, adopt the broad position contended for on the part of the plaintiffs, but must send the matter to the master for further inquiry as to the Law of Demerara" (*u*).

(*u*) *Waterhouse* v. *Stansfield*, 9 *Hare, Rep.* p. 234; 21 *L. J. N. S.* (*Ch.*) p. 881 (1852). [Cf. *Thurburn* v. *Steward*, *L. R.* 3 *P. C.* p. 478, and *Ex parte Holthausen*, *L. R.* 9 *Ch. Ap.* p. 722.]

DCCLIV. According to Mr. Burge, both "the constitution or acquisition of the *jus hypothecæ* in immoveable property, and the rights and obligations of the mortgagor and mortgagee," are wholly dependent on the *lex sitûs*. Therefore, "whether the hypothec be conventional or express, tacit or judicial, or whether it be general or special, it can affect immoveable property so far only as it is sanctioned by the Law of the place in which the property is situated" (*x*).

He relies upon Rodenburgh, Matthæus, P. Voet, and J. Voet, for this doctrine, which seems to be well established both on principle and authority. With respect to the possible conflict between the *lex contractûs* and the *lex sitûs* as to privileges or preferences arising out of the *hypotheca* or mortgage, Mr. Burge adopts the opinion of Rodenburgh, the two Voets, and Matthæus, that such privileges or preferences, even though conferred by the *lex domicilii* or the *lex contractûs*, must be governed as to their admissibility by the *lex sitûs*. So it may happen that instruments prepared in England as mortgages of property in her colonies may be ineffectual for that purpose, though the colonial Court may collect the intention of the parties from these instruments, and endeavour to execute it according to the *lex sitûs* (*xx*).

DCCLV. On the other hand, it may happen that the *hypotheca* or mortgage security may be valid according to the *lex sitûs* of the property, and yet the debt or contract be invalid, because contrary to the *lex contractûs*. On this principle it has been well decided, both in England and the United States, that the taking foreign security does not necessarily entail as a consequence that the contract is to be fulfilled where the security is taken. A loan of money in England with a mortgage security in a West Indian colony, was not allowed to have reserved for it the

(*x*) *Burge, Comm.* vol. iii. pp. 388, 389.
(*xx*) *Ibid.* p. 394.

rate of interest allowed by the *lex sitûs* (*i.e.* of the colony), because contrary to the *lex contractûs* (*i.e.* of England) (*y*).

Upon the same principle the Common Law courts of England (*z*), as well as the courts of France (*a*), and the United States (*b*), have agreed with the majority of jurists (*c*), in holding that no [proceeding *in rem*] can be entertained, or judgment *in rem* pronounced, as to immoveable property situated in another state.

DCCLVI. The English Court of Chancery, however, entertained suits which, [though not in the form of proceedings *in rem*,] had for their object to acquire a title and obtain possession of property situated out of its jurisdiction. It is difficult to defend this stretch of authority on sound principles of international jurisprudence. Mr. Burge observes (*d*), "that this court professes only '*agere* "'*in personam*;' but, as it compels the defendant to divest "himself of the property or to subject it to a burthen, it "indirectly acts on the property." The exercise of this jurisdiction, when it is founded on some contract made or some equity arising between persons in England, respecting lands in the colonies or in a foreign country, as in *Penn* v. *Lord Baltimore* (*e*), or in *Cranstown* v. *Johnston* (*f*), may be consistent with the principles laid down by jurists in the case of judgments which are both personal and real. But the exercise of its jurisdiction in making decrees for

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(*y*) *De Wolf* v. *Johnson*, 10 *Wheaton*, (*Sup. Ct.*) *Rep.* p. 367. *Stapleton* v. *Conway*, 3 *Atk. Rep.* p. 727; *Burge*, *Comm.* vol. iii. p. 395.

(*z*) *Mostyn* v. *Fabrigas*, *Cowper*, *Rep.* at p. 176, per Lord Mansfield. *Doulson* v. *Matthews*, 4 *Term Rep.* p. 503.

(*a*) See *Code Civil*, art. 2123.

(*b*) *Story*, s. 467.

(*c*) *Burge*, *Comm.* vol. iii. pp. 396, 397.

(*d*) *Ibid.* p. 398.

(*e*) 1 *Vesey sen. Rep.* p. 444.

(*f*) 3 *Vesey Rep.* p. 170, 5 *ib.* p. 277.

the foreclosure or sale of mortgaged property in the colonies is not so easily understood; it cannot, he observes, carry its decree into execution without the aid of the *forum rei sitæ*; and Mr. Burge is of opinion that a decree of the Court of Chancery could not operate as a lien on property out of its jurisdiction to the prejudice of a third party, who had acquired legally a previous lien and had had no notice of the decree (*g*).

However, the jurisdiction of the Court to decree foreclosure of lands in a foreign country was in the year 1874 expressly re-asserted (*h*).

[The doctrine to which, it is conceived, English judicial opinion now adheres, is that as to questions relating to immoveable property in foreign countries (whether they be questions of transfer, succession, lien, or otherwise), the Courts in England, which sit primarily to administer English municipal law (*i*), will not assume jurisdiction where a disputed issue of title under foreign Law is raised, or where a judgment *in rem* is sought for. A distinction, however, may be taken between countries outside England but subject to the British crown, and countries wholly foreign (*j*).

Where a remedy *in personam* only is sought for, and the title under foreign Law is not in issue, the Courts have entertained proceedings (*k*).]

(*g*) *Burge*, *Comm.* vol. iii. p. 399.

(*h*) *Paget* v. *Ede*, *L. R.* 18 *Eq.* p. 118.

[(*i*) *Cookney* v. *Anderson*, 1 *D. J. & S.* at p. 379; *Re Hawthorne*, *Graham* v. *Massey*, *L. R.* 23 *Ch. D.* p. 743.

(*j*) *In re Orr Ewing*, *L. R.* 22 *Ch. D.* at p. 465.

(*k*) *Toller* v. *Carteret*, 2 *Vernon*, p. 494; *Colyer* v. *Finch*, 5 *H. L. Cases*, pp. 905, 915; *Norris* v. *Chambres*, 29 *Beavan*, p. 246; *Paget* v. *Ede*, *L. R.* 18 *Eq.* p. 118; *Moor* v. *Anglo-Italian Bank*, *L. R.* 10 *Ch. D.* p. 681; *Buenos Ayres & Ensenada Port Rlwy. Co.* v. *Northern Rlwy. Co. of Buenos Ayres*, *L. R.* 2 *Q. B. D.* p. 210; *Ex parte Holthausen*, *L. R.* 9 *Ch. Ap.* p. 722; *In re Orr Ewing*, *L. R.* 22 *Ch. D.* p. 456; same case on appeal, *L. R.* 9 *App. Ca.* p. 34; *Re Hawthorne*, *Graham* v. *Massey*, *L. R.* 23 *Ch. D.* p. 743.]

CHAPTER XXXIX.

TRANSFER OR ASSIGNMENT OF OBLIGATIONS, (1) BY ACT OF OBLIGEE, (2) BY OPERATION OF LAW—BANKRUPTCY—PRIORITY OF LIENS AND MORTGAGES—PRIVILEGED CREDITORS—PARTNERSHIP LIABILITY.

DCCLVII. THE obligation may be transferred in two ways: 1. By the voluntary act of the obligee; 2. By the operation of the Law in the event of the obligor's insolvency or bankruptcy.

DCCLVIII. 1. The obligee may of course transfer his obligation to another person, who would be called in English his assignee. If the subject of the obligation happen to be in one State, and the assignment to be made in another, some questions of importance and of difficulty may arise as to the Law which is to govern the form of the assignment, the manner of enforcing it, the possible conflict between the rights and liens of the assignee and those of the creditor or trustee of the assignor.

DCCLIX. What the English Law terms *choses in action*, *e.g.* debts, and rights or causes of Action, are universally treated by jurists as attached to the person of the creditor, and governed by the Law of his Domicil (*a*). They may be the subject of assignment either absolutely or conditionally, with or without notice or intimation to the debtor, according to that Law. The position is, in fact, a part of

(*a*) *Story*, ss. 352–355, 395–400, and 565, 566.
Burge, Comm. vol. iii. pp. 777, 778.
Bell's Principles of the Law of Scotland, book ii. part ii. chap. v. § 1341.

the general proposition that moveables are transferable according to the *lex domicilii* of the owner. It is well supported as an axiom of English, Scotch, and North American United States Law, by the authority of Lord Hardwicke, Lord Loughborough, Lord Kenyon, Lord Kames, and Mr. Justice Story (*b*).

The English Judges, as will be seen, apply this doctrine not only to *voluntary assignment* by the party, but also to *assignment by operation of Law*, as in case of bankruptcy.

DCCLX. The *lex fori*, as will be seen, governs the form in which remedies are to be enforced. On this principle Mr. Burge [considered] that even an obligation assignable by the *lex domicilii* of the obligee, must [have been] sued upon in England, when choses in action [were at] common law not assignable, in the name of the original obligee (*c*); an Irish case (*cc*) to the contrary [did not, in his opinion,] counterbalance the English cases (*d*) which decided this point.

It would seem reasonable, however, that a distinction should have been taken between the case of an obligation which was assignable in its origin and inception, and the case of one not so assignable (*e*), and to confine to the latter class the rule insisted upon by Mr. Burge.

DCCLX.A. In a recent case, to an action for money

(*b*) [*Solomons* v. *Ross*, 1 *H. Blackstone*. p. 131, note]; *Sill* v. *Worswick*, 1 *H. Blackstone*, p. 665, and cases therein referred to.

Selkrig v. *Davies*, 2 *Rose Bkcy. Cases*, p. 97.

Hunter v. *Potts*, 4 *Term Rep.* p. 182.

Story, ss. 397-8.

(*c*) [*Burge*, *ubi sup.* p. 778.]

(*cc*) *O'Callaghan* v. *Thomond*, 3 *Taunton*, *Rep.* p. 82.

(*d*) *Folliott* v. *Ogden*, 1 *H. Blackstone*, *Rep.* p. 123.

Innes v. *Dunlop*, 8 *Term Rep.* p. 595.

Wolf v. *Oxholm*, 6 *Maule & Selwyn*, *Rep.* p. 92.

Jeffery v. *MacTaggart*, *ib.* p. 126.

[By the Supreme Court of Judicature Act, 1873, s. 25, subs. 6, debts and other legal choses in action were made assignable by writing under the hand of the assignor, under certain conditions.]

(*e*) *Westlake*, § 221.

payable to the plaintiff, the defendant pleaded—That C., a joint debtor, resided in California, within the jurisdiction of a court there: That by the Law of California a creditor might voluntarily assign his debt to another person who might in his own name sue the debtor: That the plaintiff being in California assigned the debt to R. there, and R. in his own name sued the defendant and C. for that and other debts in a court there, having jurisdiction for the recovery of such assigned debts, and recovered judgment, and the defendant and C. were liable to be sued by R. in England upon that judgment: That the judgment was for an entire sum, making no distinction between the debts, and was partly satisfied by the levy of a sum less than the amount of the judgment, and not applicable to any one of the debts recovered more than to any other. Replication—That the Law of California was that the assignee might reassign to the creditor the debt or so much thereof as was unsatisfied, and the creditor might sue in his own name for so much, notwithstanding the creditor in the meantime had recovered judgment, unless the whole was actually levied: That R., before he had received any part of the debt or before any sum applicable thereto had been levied, reassigned to the plaintiff, by reason whereof the plaintiff became entitled to sue for the debt in his own name as if there had been no such assignment as mentioned in the plea:—It was holden, that assuming the plea to show that the assignment made in California by the Law of that country transferred the exclusive right to sue, it was answered by the replication (*f*).

DCCLXI. As to the form of the assignment itself, the *lex loci* of the transaction must govern: this question and others kindred to it are more fully discussed in a subsequent chapter on Bills of Exchange.

DCCLXII. Questions of great nicety and difficulty may

(*f*) *Thompson* v. *Bell*, 3 *Ell. & Bl.* p. 236; 23 *L. J. N. S.* (*Q. B.*), p. 159.

arise on the subject of *priority of liens*, in cases where the assignment is validly made in one state of an obligation or of any other personal property, but the property happens to be locally in another state, by the Law of which it is liable to be attached by a creditor or trustee of the assignor. The true rule would seem to be, that if the creditor or trustee of the assignor had notice, at any time before judgment, of the prior lien of the assignees, such lien would be entitled to priority. The *lex fori* might certainly hold a different doctrine, and apply wrongly the maxim *qui prior est in tempore potior est in jure*; but then the property might be found afterwards in a third state, and the assignee might there sue for it, and the court of this third state decide that the assignee, and not the creditor or trustee of the assignor, was entitled to it.

DCCLXIII. On the other hand, where the attachment has been made by the creditor or trustee in the place where the property actually is, before the assignor had made the assignment, there is room for the application of the maxim *qui prior est in tempore potior est in jure*; and Story agrees with the high authority of Casaregis, that it would be rightly applied by giving priority to the lien of the creditor or trustee over that of the assignee (*g*).

DCCLXIV. 2. In the preceding sections we considered the transfer of an obligation by the voluntary act of the obligee. We have now to consider the transfer of an obligation by the operation of the law (*h*) upon the property of

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(*g*) Story (*Confl. of L.* ss. 399 *a*–400 *a*) refers to some decisions in the Courts of Louisiana.

(*h*) *Savigny*, *R. R.* viii. s. 374 E.

J. Voet, lib. xx. t. iv. ss. 12 *et seq.*

Merlin, *Rép.*, Faillite et Banqueroute, sect. ii. § ii. art. x. (p. 412, edit. 1826.)

Massé, *Droit Commercial*, liv. iii. tit. iii. chap. v.

Story, ss. 338-341 as to *Discharge*; 403-423 as to *Involuntary transfers.*

Bell, *Comm.* book vi. part ii. chap. v. sect. vi.

the obligor; that is, the effect of his Bankruptcy or Insolvency (*i*).

DCCLXV. The effect of the bankruptcy or insolvency (*concursus creditorum — Concurs — Faillite, Banqueroute — [Fallimento]*) of the obligor upon the obligation is most important; it has the double consequence of *transferring* and of *discharging* the obligation.

DCCLXVI. Bankruptcy—as it is well put by Savigny —supposes this state of things: a debtor unable to pay more creditors than one the full amount of his debt to them. In order to apportion this amount, his whole property must be collected into one mass or heap, be turned into money, and distributed according to certain principles amongst his creditors.

As the object to be attained by this process is to deal with the claims and rights of various creditors, this can only be successfully accomplished at one place; and that place, it is obvious, ought to be the Domicil of the debtor (*j*). This is a case, therefore, in which the *special* jurisdiction appertaining to the obligation itself must give place to the jurisdiction over the person of the obligor.

That this question should receive a uniform answer from the various States which compose the great community of moral societies, is a matter of the last importance to the best interests of commerce; and, perhaps, the prac-

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Burge, Comm. vol. iii. ch. xxii.
Westlake, ch. vi.

(*i*) These two processes had formerly different effects, and were applied to different classes of persons, in England; but now there is one process of universal application, that of *Bankruptcy*. See [the "Bankruptcy Act, 1883," 46 & 47 Vic. c. 52.] In the Australian Colonies the process has been generally called *Insolvency*.

[(*j*) In England a bankruptcy petition cannot be presented against a debtor unless he "is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England," 46 & 47 Vic. c. 52, s. 6, subs. 1, D.) *Ex parte Cunningham, L. R.* 13 *Q. B. D.* p. 418. *Ex parte Barne, L. R.* 16 *Q. B. D.* p. 522.]

tice of Comity is more in accordance with reason and justice upon this point than upon any other.

DCCLXVII. The collection of the scattered property of the debtor into one mass, and its conversion into money, can be effected without difficulty where the property is situate within one state and one jurisdiction. The difficulty arises when the property is dispersed, situate in various states, and subject to various jurisdictions: what jurisdiction shall then obtain? What Law ought to govern the dealing with the bankrupt's estate, both as to its collection and distribution, and be binding on all the creditors?

DCCLXVIII. It is clear that in all cases in which the property of the bankrupt is in various states, one of two systems must be adopted: Either (i) there must be as many adjudications in bankruptcy as there are places in which there happens to be a portion of the debtor's property; or (ii) there must be one adjudication in bankruptcy at the domicil of the debtor. The first is a barbarous system, fraught with inconvenience and injustice. It is also open to the objection of establishing the *forum rei sitæ* for personal actions. The second is in harmony with the soundest principles of comity (*k*). And if the foreign state allows the curator, [or trustee of the debtor's property,] appointed by the state of the debtor's domicil to bring actions according to the *lex fori* in its own tribunals, the national independence is preserved, while international and general justice is promoted.

DCCLXIX. The true principles of International Law are laid down by Gail in clear language: "Quoniam sæpe "contiugit, hujusmodi decoctores et debitores fugitivos

(*k*) But for this purpose a *commercial* domicil would probably be sufficient. There are on this point two apparently conflicting English cases, *Re Blithman*, *L. R.* 2 *Eq.* p. 23; *Re Davidson's Trusts*, *L. R.* 15 *Eq.* p. 383. [See preceding note; and see *Yate Lee & Wace on Bankruptcy*, notes to s. 44 of the Bankruptcy Act, 1883 (p. 317, 3rd edit.). *Thurburn* v. *Steward*, *L. R.* 3 *P. C.* p. 478, may be referred to.]

" et fraudulenter latitantes, in diversis locis merces et alia " bona habere, quis erit judex competens, pro faciendâ " immissione vel venditione quorumcumque bonorum " in alieno territorio existentium? Dicendum *judicem* " *domicilii debitoris* adeundum esse, ad hoc ut cognoscat, " et pronuntiet super faciendâ immissione, vel venditione " quorumcumque bonorum, ubicumque locorum existen- " tium." He adds a sound limitation, or rather accessory proposition: " At *executio* non potest fieri per eundem " judicem, sed *judex territorii* adiri, et pro faciendâ " executione requiri debet " (*l*).

DCCLXX. The decisions of the English, Scotch, and Irish Courts have, after much debate and controversy, slowly but firmly incorporated the true principles of International Law upon this question into their domestic jurisprudence. The following propositions are now firmly established: First, that the moveable or personal estate of the bankrupt must be taken to be situated in that state in which the bankrupt is domiciled. Secondly, that a proceeding by adjudication in bankruptcy in England or in Ireland, and the assignment following thereupon,—a sequestration in Scotland,—and, in fine, any assignment under the bankruptcy law of a foreign state in which the debtor was domiciled,—have the effect of transferring to the persons nominated by Law—whether assignees, trustees, syndics, or curators—the whole *moveable* estate of the bankrupt. England, therefore, recognizes the operation of the foreign bankruptcy law upon English *personalty*; and expects, and as far as she can, enforces, the same recognition of her bankruptcy law upon personalty in a foreign state (*ll*). From these two principal propositions the following are

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(*l*) Lib. ii. obs. 130; lib. i. obs. 113, n. 16; cited *Burge, Comm.* vol. iii. chap. xxii. p. 905.

[(*ll*) See *Banco de Portugal* v. *Waddell, L. R.* 5 *App. Ca.* at p. 169, per Lord Selborne.]

corollaries which have been worked out on reason and principle: viz.—

a. That an attachment by an English creditor, not acquired by a specific lien prior to, but acquired after, the assignment of a foreign bankruptcy, with or without notice to the bankrupt, is impotent to affect the assignment (*m*).

β. That, nevertheless, if the Law of the foreign State in which the property may be, should, in violation of comity, exercise jurisdiction over the property, and by express regulation prefer the claim of the attaching creditor to the previous assignment under the [English] bankruptcy, the title so conveyed by the *lex rei sitæ* and *lex fori* would not be disregarded in England so as to compel the creditor, when within English jurisdiction, to refund the property so acquired (*n*).

γ. That such a creditor, however, will not be allowed to take advantage of the English bankruptcy without first communicating the benefit derived from his proceedings in the foreign State.

δ. That the last-mentioned axiom, however, does not apply where the creditor obtains by his diligence something which did not and could not form a part of the English fund, or pass to the trustee under the bankruptcy, *e.g.* foreign real estate (*o*).

DCCLXXI. The case of *Le Feuvre* v. *Sullivan*, decided

(*m*) *Story*, s. 409.

(*n*) *Sill* v. *Worswick*, 1 *H. Blackstone*, *Rep.* at p. 693.
Cazenove v. *Prevost*, 5 *Barn. & Ald. Rep.* p. 70.

(*o*) *Cockerell v. Dickens*, 3 *Moore*, *P. C. Rep.* p. 98.
Mr. Westlake remarks that ["when a debtor to one who is a bankrupt in England has paid his debt since the commencement of the bankruptcy, under process of law in any country British or foreign, the trustees in the bankruptcy cannot make him pay it over again, though the creditor who compelled the payment by process of attachment may be accountable for it to the trustees."—S. 130.] (*Le Chevalier* v. *Lynch*, 1 *Douglas*, *Rep.* p. 170.)

by the Judicial Committee of the Privy Council, is one of great importance in its bearing upon the present question. In 1833, A., domiciled in Jersey, deposited with B., domiciled in England, a policy of insurance effected in Jersey upon A.'s life, for the sum of 499*l.*, as security for the sum of 210*l.*, advanced by B. to him. This transaction took place in England. No notice of the deposit was given to the Insurance Office, who afterwards, upon a false representation of the loss of the policy, delivered to A. a duplicate of the policy, which, in 1835, he by deed assigned to his wife (from whom he had obtained a judicial sentence of *séparation de biens*), in consideration of the sum of 400*l.*, alleged to have been paid by her to him. Notice of this assignment was given to the Insurance Office. A., or his wife, paid the premiums till A.'s death. In 1838, A. became insolvent, and made a *cessio bonorum* of his property, but no proof of B.'s debt was registered by B. under A.'s insolvency. In an action brought in Jersey by A.'s wife against the Insurance Office to recover the amount of the policy, B. intervened, and claimed a lien under the deposit with him by A. of the original policy. It was holden, first, that as B.'s domicil was English, and the contract made in England, B. had by the English Law a lien upon the policy; secondly, that the *cessio bonorum* made by A., in Jersey, did not affect such lien (*p*).

DCCLXXII. In the same case it was decided that "a "debtor's person, and his general estate before and after "his death, may, by bankruptcy, or judicial insolvency, or "lapse of time, be effectually discharged or protected "from a debt to which property specifically pledged for "it, specifically charged for it, or specifically made a "security for it, may yet remain liable" (*q*).

(*p*) *Le Feuvre* v. *Sullivan* (1855), 10 *Moore, P. C. Rep.* p. 1 (marginal note).

(*q*) *Ibid.* p. 13.

Clark v. *Mullick*, 3 *Moore, P. C. Rep.* p. 252, was the case of an

DCCLXXIII. The French Law is, in its general principle, liberal on this subject (*r*); it admits the syndic [or assignee], nominated by the foreign State, which has cognizance of the bankruptcy, to take proceedings against the bankrupt's effects in France: nor, as it would appear according to the better opinion, does it inquire whether the bankruptcy has been declared with, or contrary to, the consent of the bankrupt; in either case (*s*) the sentence operates in France as a *chose jugée* by a competent tribunal. But this proposition does not extend to the case of a bankrupt who has two trading establishments (*t*), one of which is in France, the other foreign. There seems to be a doubt, however, whether the sentence of the foreign bankruptcy can be pleaded in bar of proceedings taken by individuals against the effects or the property in France. Fœlix asserts that it cannot: Demangeat thinks it can, except against a French creditor: an exception in favour of native subjects, the principle of which pervades many of the judgments of the French courts in cases where the rights of a foreigner and a native come into collision. Another question has been much discussed—whether a foreign sentence of bankruptcy affects the civil capacity of the bankrupt in France. Fœlix (*u*) affirms that it does, the same as *un jugement d'interdiction*. Massé thinks that

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assumpsit by the assignee of a bankrupt, under an English commission, against a native of India, resident within the jurisdiction of Calcutta. The English Bankruptcy Acts were holden not to affect the mode of taking evidence in India.

(*r*) *Fœlix*, liv. ii. tit. vii. s. 468, note (*a*); the editor, Demangeat, reviews in this note the whole law.

[See French *Code de Commerce*, liv. iii.]

(*s*) Massé (*Droit Comm.* tome ii. num. 314, ed. 1844) thought only in the latter case; but in his last ed. (1874, num. 809) he has altered his opinion and includes both cases.

(*t*) *Vide post*, § dcclxxvii.

(*u*) Liv. ii. tit. i. s. 89: "L'individu interdit dans son pays, et par là rendu incapable, l'est aussi en pays étranger. Il en est de même du failli déclaré tel dans sa patrie, ainsi que de l'absent."

the bankrupt would not be permitted to have an account at the Bank of France, or be allowed the *entrée* of the Bourse; but that it would be competent to him to make payments and transfer property not forbidden by the sentence of bankruptcy; that the sentence has the effect of a real, and not a personal, statute.

Demangeat agrees with this opinion, which is founded on the high authority of Casaregis. And as to immoveable property, the law of the French *Code de Commerce* (*x*) respecting the "*inscription*" of the immoveable property of a bankrupt renders the doctrine above stated indisputable.

The French tribunal also will pronounce a sentence of bankruptcy in the case of a foreigner,—an exception to its usual principle on the subject of foreigners, founded on the doctrine, that such a sentence is only "*une mesure* "*conservatoire*" (*y*).

DCCLXXIV. The decisions of the Courts of the United States, contrary to the opinions both of Story (*z*) and Kent (*a*), do not admit this extra-territorial operation of foreign bankruptcy laws; grounding their breach of comity in this respect upon the plea that the admission of the foreign law would in this case prejudice the right of their own citizens (*b*). Nevertheless, in most of the cases in which assignments under foreign bankrupt laws have been denied to give a title against attaching creditors, it has been admitted that the assignees might maintain,

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(*x*) Les syndics "seront tenus aussi de prendre inscription, au nom de la masse des créanciers, sur les immeubles du failli dont ils connaîtront l'existence."—Art. 490.

(*y*) So decided by *Trib. de Commerce de la Seine*, 7 Oct. 1846; *Gaz. des Trib.* 8 Oct. 1846.

(*z*) *Conflict of Laws*, ss. 409 *et seq.*

(*a*) *Comm.* vol. ii. p. 406.

(*b*) *Betton* v. *Valentine*, 1 *Curtis*, (*Circuit Court*) *Rep.* p. 168.

Booth v. *Clark*, 17 *Howard*, (*Sup. Ct. U.S.A.*) *Rep.* p. 322.

Holmes v. *Remsen*, 4 *Johnson*, (*New York Chancery*) *Rep.* p. 460; 20 *Johnson* (*New York Supreme Court*), p. 229: this appears to be the leading case.

under such assignments, suits in the United States courts for the property of the bankrupt; and Story justly observes that this admission surrenders the principle, inasmuch as the assignees could not sue unless they possessed some title under the assignment (*c*).

DCCLXXV. In fact, as Story (*d*) says, the point in the United States has hitherto been a struggle for priority and preference between parties claiming against the bankrupt under opposing titles; the assignees [under the bankruptcy] claiming for their general creditors, and the attaching creditors for their separate rights (*dd*).

These priorities and privileges are, in the case of *moveable* property, as a general rule (*e*), governed by the law of the domicil of the debtor (*f*), and in the case of

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(*c*) *Story*, s. 420.

(*d*) S. 420; see *Ogden* v. *Saunders*, 12 *Wheaton*, *(Sup. Ct.)* *Rep.* pp. 358–369.

[(*dd*) See *Kent*, *Comm.* vol. ii. pp. 404–408, and the cases there cited.]

(*e*) The *lex situs* may prescribe a different rule.

Andrewes v. *his Creditors*, 11 *Louisiana Rep.* p. 464.

(*f*) *Story*, ss. 423 *a*, 423 *b*. According to English law by the *lex fori* of the bankruptcy. ["The proper order and priority of distribution of assets, in a *concursus* of creditors, is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution. . . . In a bankruptcy taking place in England, and in the administration in England of assets under a bankruptcy, we should pay specialty and simple contract debts equally, even although the country in which one of the debts was contracted might recognize a distinction between those two classes of debts and give a priority to specialty debts over simple contract debts. In like manner, in other cases less important, we give a priority to certain classes of creditors, such as those claiming for wages, those claiming for rent . . . a priority over other creditors of the bankrupt, even although those other creditors might be such by reason of contracts entered into in foreign countries where the domicil of these creditors, and perhaps of the bankrupt, might be situated, and where no such priority might be recognized. We take no notice of the *origin of the debts* of other creditors; we take upon ourselves the right of regulating, in those instances which I have mentioned, the application of the assets." Judgment delivered by Lord

real property by the *lex rei sitæ* (*g*); the same principle ought to be applied both to the assignments of the debtor, voluntarily made, and to an assignment made under the operation of a law of bankruptcy.

DCCLXXVI. Upon this nice question of the *privilegia* or priority of liens, it is to be observed that the States which have adopted as their basis the Roman Law (*h*), have, according to Savigny (*i*), worked out the following system.

All the creditors are divided into five classes:—

i. Those who have absolute privileges or rights of priority.

ii. Those who have privileged hypothecs.

iii. Those who have ordinary hypothecs.

iv. Those who have personal privileges.

v. All who are not included under the foregoing categories.

Of these five classes, the first, the fourth, and the fifth consist of pure obligations, and are clearly justiciable by the Law of the place in which the bankruptcy is declared, whatever may be the place in which the obligation had its origin, or in which it was to be fulfilled.

The second and the third classes relate to creditors who have a hypothec or mortgage. Every creditor of this description has in reality a right of a mixed character, composed partly of a simple creditor's right, and partly of a right appertaining to real property.

In Savigny's opinion, the tribunal of bankruptcy sitting in the domicil of the debtor, ought to include these hypothecs or mortgages; but should preserve to each creditor

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Chancellor Cairns in] *Thurburn* v. *Steward*, *L. R.* 3 *P. C.* at p. 513. *Ex pte. Melbourn*, *L. R.* 6 *Ch. App.* p. 64.

(*g*) *Story*, s. 423 *a*.

(*h*) See the *cessio bonorum* of the Roman Law discussed in the next chapter, on the *discharge* of obligations.

(*i*) *Savigny*, *R. R.* viii. s. 374 B.

the priority and privilege conferred on him by the Law of the place in which the thing, which is the subject of the hypothec or mortgage, is situated. For he holds it to be clear law that this right of priority is governed by the *lex rei sitæ*. The proof that such a scheme is practicable, is to be found, he says, in the fact that it was the basis of various treaties which Prussia entered into with her neighbours, and was found in practice to work well.

DCCLXXVII. Mr. Bell, after speaking of the establishment in Scotland of the true principles of International Law on the subject of bankruptcy, in the case of individuals, observes: "Great difficulty still remained in the case of a "*company* having a domicil in several countries. Admit- "ting the doctrine of *Strothers* v. *Reid*, as ruling the case "of an *individual*—viz. that the Law of the domicil re- "gulates, in bankruptcy, as in succession, the effect of the "conveyance to the creditors,—still it was doubtful what "should be the effect of a double domicil with a double set "of creditors, each trusting to the laws of bankruptcy as "established in the domicil of their debtor. This was the "difficulty that occurred in the case of the *Royal Bank of* "*Scotland* v. *Stein*; but the court disregarded the distinc- "tion, and held the proceedings in bankruptcy, in either "of the domicils of the company, to comprehend the whole "personal estate of the entire concern" (*k*).

But in England a different opinion appears to have obtained. Sir W. Grant has holden, that the bankruptcy of a partner, resident in England, could not affect the partners remaining in the West Indies, so as to divest them of the management of the partnership concerns, or of the disposition of the partnership property; and that the British West Indian creditor of the firm, who had attached a debt due to the firm in the West Indies, and procured a

(*k*) *Bell, Comm.* book vi. part ii. chap. v. 47 (vol. ii. p. 377).
Royal Bank of Scotland v. *Cuthbert* [or *Stein*], 1 *Rose, Bkcy. Cases*, p. 462.

judgment and satisfaction there, could not be compelled to refund the same upon a suit brought by the assignees against him in England (*l*). Story considers this doctrine to be generally recognized by foreign states, in cases where partners reside in different states (*m*).

DCCLXXVIII. In 1856 a case, involving the consideration of the rules of International Law applicable to cases of double partnership, came before the Lords Justices, [and was ultimately decided by the House of Lords (*n*). Two persons who constituted a firm at Liverpool entered into partnership with a third person at Pernambuco, in Brazil, and there established a separate and distinct firm. The Pernambuco firm drew bills which were accepted by the Liverpool firm in the ordinary course of business. The Liverpool firm became bankrupt, and subsequently the Pernambuco firm entered into a *Concordata* with their creditors. The holders of the bills, having received a dividend out of the assets of the Pernambuco firm as drawers, tried to prove against the Liverpool firm as acceptors.] Such bills, it was holden, having been accepted in England, must be dealt with by the rules of English Law, [and the double proof was not admitted.

The English law as to double partnership has now, however, been altered, and it is provided by the Bankruptcy Act, 1883 (*o*), that "if a debtor was at the date of the "receiving order liable in respect of distinct contracts as "a member of two or more distinct firms, or as a sole con- "tractor, and also as a member of a firm, the circumstance "that the firms are in whole or in part composed of the

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(*l*) *Brickwood* v. *Miller*, 3 *Merivale*, *Rep.* p. 279.

(*m*) *Story*, s. 422.

Merlin, *Rép.* Faillite, sect. ii. § ii. art. x.

Harrison v. *Sterry*, 5 *Cranch*, (*Sup. Ct.*) *Rep.* p. 289.

(*n*) *Ex parte Goldsmid*, *Re Deane & Youle*, 25 *L. J. N. S.* (*Bkcy.*) p. 25; same case in H. of Lords, 5 *Jurist*, *N. S.* p. 1230.

[(*o*) 46 & 47 Vic. c. 52, schedule 2, rule 18; this repeats almost verbatim the 37th section of the Bankruptcy Act, 1869.]

" same individuals, or that the sole contractor is also one " of the joint contractors, shall not prevent proof in respect " of the contracts, against the properties respectively liable " on the contracts."]

DCCLXXIX. The International effect of assignment under Bankruptcy laws is confined by the practice of states to *moveable* property. These laws therefore only transfer such *immoveable* property as lies within their jurisdiction. It follows that an assignee, [trustee,] or curator, appointed by these laws, cannot assume the possession or administration of immoveable property in a foreign state, unless his authority is enforced by the judicial tribunals of that state (*p*). And yet Mr. Bell justly observes, that the spirit and policy of the laws, considered internationally, should open to the creditors of a bankrupt the power of attaching his real estate in another country (*q*).

[The 168th section of the Bankruptcy Act, 1883 (*r*), interprets the word " property " as including, among other things, " land and every description of property, whether " real or personal, *and whether situate in England or else-* " *where*; " these last words not being contained in the corresponding interpretation of " property " in the Bankruptcy Act, 1869 (*s*): and it seems that under this section land in the United Kingdom, and perhaps also in the rest of the British dominions, would become vested in the trustee under an English bankruptcy—as by express enactment it would under a Scotch sequestration (*t*). But an

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(*p*) *Burge*, vol. iii. chap. xxii. p. 921. He cites *Gaill*, l. ii. obs. 130.

J. Voet, lib. xlii. t. vii. s. 2; lib. xx. t. iv. s. 12.

P. Voet, de Stat. Sect. ix. c. ii. 18; Sect. iv. c. ii. 6.

Boullenois, tome i. pp. 129, 150.

(*q*) *Bell, Comm.* book vi. part ii. chap. v. 48 (vol. ii. p. 379, ed. of 1870).

[(*r*) 46 & 47 Vic. c. 52.

(*s*) 32 & 33 Vic. c. 71, s. 4.

(*t*) 19 & 20 Vic. c. 79, s. 102.]

English bankruptcy cannot pass to the trustee immoveable property situate in a country not subject to the British Crown. The creditors here by opposing the order of discharge may constrain the bankrupt to convey such property to the trustee, but it is doubtful whether he can by law be compelled to do so. An Insolvency in the colony of Victoria will not vest in the assignee real estate in England (*u*). But where land in England was settled in trust to pay the rents to S. L. for life, or until he should commit an act of bankruptcy, or some event should occur whereby the rents if settled absolutely in trust for him should be forfeited to or become vested in any other person, and there was a gift over on the happening of any such event, it was holden that on S. L. being adjudged an insolvent in New South Wales, where he was resident, the gift over took effect (*v*)].

[(*u*) *Waite* v. *Bingley*, *L. R.* 21 *Ch. D.* p. 674. A.D. 1882.

(*v*) *In re Levy's Trusts*, *L. R.* 30 *Ch. D.* p. 119. As to the difficulties that may arise with regard to property and creditors in another country, see *In re Oriental Inland Steam Co.*, *L. R.* 9 *Ch. App.* at p. 559 (per James L. J.), and *Ex parte Rogers*, *L. R.* 16 *Ch. D.* p. 665.]

CHAPTER XL.

OBLIGATION—DISCHARGE—UNDER WHAT LAW.

DCCLXXX. It is proposed in this chapter to consider the questions—

1. How an *obligatio* is discharged or becomes extinct.

2. By what Law the discharge or extinction is governed.

The latter question is, of course, the one which is more properly the subject of this treatise; but the former is not an uninteresting question of general jurisprudence.

DCCLXXXI. 1. And first as to the Roman Law, the basis of European jurisprudence: "Ut obligandi debitoris," Donellus says, "certi modi sunt jure constituti, ita et liberandi" (*a*).

An *obligatio* ceases to be binding (*tollitur*) in various ways. The following are said to be discharges of an *obligatio, ipso jure*:—

i. Actual payment of what was due—*solutio* (*b*).

ii. A verbal acknowledgment in a particular form of

(*a*) *De Jure Civ.* lib. xvi. ("De solutionibus et omnis generis liberationibus") cap. i. [("Quibus modis tollatur jure obligatio: ac primum de interitu et periculo rei debitæ"), 2.] This is an admirable chapter, and deserves the most careful study.

(*b*) By whatever means the *obligatio* ceases, "solvitur obligatio" is the proper technical expression.

Burge, vol. iii. ch. xxi. pp. 781 et seq.

Rocco, lib. iii. cap. ix. pp. 347 et seq.

Savigny, R. R. v. s. 248.

Puchta, Pand. §§ 286–292.

words that payment has, though actually it has not, been received—*acceptilatio* (*c*).

iii. A similar symbolical process in the case of an *obligatio* contracted *per æs et libram*, by which the debtor became *nexus*.

iv. Being changed into another *obligatio*, for which the technical term was *novatio* (*d*).

v. [The union, or merging] in one person, of the relations of obligor and obligee, or of debtor and creditor, which union is termed *confusio*.

DCCLXXXII. The following are said to be discharges of an *obligatio*, *ope exceptionis*, or *per exceptionem*.

i. A decision of a competent court of justice, *res judicata*, or *ex causâ judicatâ*. Indeed, strictly speaking, the *obligatio*, in its technical sense, ceased as soon as legal proceedings, *litis contestatio*, began; but the *naturalis obligatio* is not destroyed by the *res judicata*.

ii. A treaty (*e*) or agreement known to the civil (*f*) and canon Law (*g*) by the term *transactio*, which is *species pacti*. Three conditions were necessary to found this mode of extinguishing an obligation (*h*):

α. That the *transactio* should be *de re dubiâ ac lite incertâ*.

β. That something should be promised;

γ. Or something done as an equivalent for the right waived.

DCCLXXXIII. The modes of discharge or extinction,

(*c*) *Dig.* lib. xlvi. t. iv.; *Inst.* lib. iii. t. xxix. 1, 2.
At first only applied to debts contracted by *stipulatio*.

(*d*) *Dig.* lib. xlvi. t. ii.; *Inst.* lib. iii. t. xxix. 3.

(*e*) Called by the Germans *Vergleich*: see *Puchta, Pandekt.* § 294: different from *Compromiss*, which answers to our *arbitration*. *Ibid.* § 296.

(*f*) *Dig.* lib. ii. t. xv.
Cod. lib. ii. t. iv. "De transactionibus."

(*g*) *Devoti Instit. Canon.* lib. iii. t. xviii. "De pactis et transactionibus."

(*h*) *Cod.* lib. ii. t. iv. 38.

according to the English Law, vary in name, but scarcely in substance, from those of the Roman and Continental jurisprudence.

For instance, the direct fulfilment of the obligation, or the payment of the debt, is of course the *solutio*: [the making of a new contract and the substitution thereof in the place of an original one, before any breach of the latter, may operate as a discharge of the original contract, and would answer to the *novatio* (*i*): if a lease and its immediate reversion become vested at the same time in one person in the same right, there is a union in that person of the relations of landlord and tenant, and there ensues an extinguishment of the covenants or agreements in the lease, corresponding] to the *confusio* (*k*): the *Set-off* answers to the *compensatio* (*l*): the Statutes of Limitation answer to the *præscriptio* (*m*).

The same observations apply to the North American United States, with the exception of Louisiana, which is governed by the Roman Law.

[(*i*) *Addison on Contracts*, book v. ch. iii. sect. ii. (p. 1226 of 8th edit.). The term "novation" is now not infrequently used in English law; *Conquest's Case*, *L. R.* 1 *Ch. D.* p. 334.

Pothier, *Oblig.* partie iii. chap. ii. §§ 581-605; in this chapter Pothier treats also of *délégation*, "qui est une espèce particulière de novation."]

[(*k*) *Broom*, *Comment. on Common Law*, book ii. ch. iv. (p. 537, edit. 1888); *Woodfall*, *Landlord & Tenant*, ch. viii. s. 4; *Pothier*, *Oblig.* §§ 641-648: "on appelle *confusion*, le concours de deux qualités dans un même sujet, qui se détruisent." § 641.]

(*l*) *Story*, *Contracts*, §§ 1468-1471; *Pothier*, *Oblig.* [partie iii. chap. iv. §§ 623-640: "La compensation est l'extinction qui se fait des dettes dont deux personnes sont réciproquement débitrices l'une envers l'autre, par les créances dont elles sont créancières réciproquement l'une de l'autre." § 623]. *Massé*, *Droit Commercial*, liv. v. tit. i. ch. v. sect. iv. nos. 2237-2329. "Compensatio est debiti et crediti inter se contributio." *Dig.* lib. xvi. t. ii. 1. Set-off seems to be matter of procedure, and, as such, determinable by the *lex fori*. *Macfarlane* v. *Norris*, 2 *Best & Smith*, *Rep.* p. 783; 31 *L. J. Q. B.* p. 245.

[(*m*) *Burge*, vol. iii. part ii. chap. xxi. sect. vi. *Addison on Contracts*, book v. ch. iii. sect. iii. (p. 1248 of 8th edit.) *Pothier*, *Oblig.* § 671. *Massé*, *Droit Comm.* liv. vii. nos. 3009-3018.]

DCCLXXXIV. The Civil Law required for the discharge of certain conventions, that the *transactio* should be effected through the medium of the *Aquiliana stipulatio* (*mm*). But these technicalities were disregarded by the Canon Law, which greatly favoured this mode of adjusting disputes.

"Sed canones," Devoti says, "non laborant de istâ "nimis attenuatâ diligentiâ juris civilis, et Aquilianâ etiam "stipulatione neglectâ obligationes quoquo modo contractas "*transactione* omnino perimi volunt" (*n*).

DCCLXXXV. 2. We have now to consider by what Law the validity of the discharge, or extinction, of the obligation is governed (*o*).

DCCLXXXVI. The general principle is thus enunciated by two distinguished jurists: "Ut ita," J. Voet says, "se- "cundum cujus loci jura implementum accipere debuit "contractus, juxta ejus etiam leges resolvatur" (*q*). Burgundus lays down the rule, perhaps more accurately: "Ea "verò quæ ad complementum vel executionem contractûs "spectant, vel absoluto eo superveniunt, *solere a statuto loci* "*dirigi, in quo peragenda est solutio.* Rationem mutuantur "a jurisconsulto, qui unumquemque vult, in eo loco con- "traxisse intelligi in quo ut solveret se obligavit" (*r*).

The result of all the best authorities, juridical and judicial, is that the discharge of an obligation, in the State in which it was contracted to be discharged, is everywhere

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[(*mm*) *Vide Inst.* lib. iii. t. xxix. 2.]

(*n*) *Devoti*, *ib.* s. vii.

(*o*) *Rocco*, lib. iii. cap. ix.

Massé, *Droit Comm.* num. 127 (ed. 1844), liv. ii. tit. ii. num. 612 (ed. 1874).

Burge, vol. iii. ch. xxi. sect. vii.

Story, *Conflict of Laws*, ss. 330-351 *d.*

Bell, *Comm.* vol. ii. Conclusion, sect. iii. (p. 575 of 7th edit.)

Westlake, chap. xiii. §§ 223-227.

(*q*) Lib. iv. t. i. s. 29.

(*r*) *Tract.* iv. n. 29, *Boullenois*, tome ii. p. 498, obs. 46; cited *Burge*, vol. iii. ch. xxi. sect. vii. p. 875.

recognized as a valid discharge. It is frequently said that the discharge must be according to the Law of the place of the contract, but this is, because that is assumed to be identical with the place fixed for the payment of the debt (*s*) or discharge of the obligation: and Burgundus, therefore, says accurately, "*locus* in quo peragenda est *solutio*" (*t*). This is in accordance with the maxim taken from the Roman Law, "Contraxisse unusquisque in eo loco intelli-"gitur in quo ut solveret se obligavit" (*u*).

It is to be remembered that the place in which the contract is made is always presumed to be the place in which it is to be performed, unless some other place is named [or indicated] (*x*).

DCCLXXXVII. The decisions of the Courts in England and in the United States are happily in accordance with the opinions of foreign jurists. Lord Mansfield first laid down with authority and firmness the rule, "that what is "a discharge of a debt in the country where it was con-"tracted is a discharge of it everywhere" (*y*). By this judgment one of the most important subjects of International Jurisprudence has taken firm root in English Law.

In the case of *Gardiner* v. *Houghton* (*z*), the declaration was for money received, money lent, money paid, interest, and on accounts stated. Plea, that the defendant was resident in the colony of Victoria, and that the debts were contracted within the colony, and subject to the laws thereof; and that the defendant was discharged from the

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(*s*) *Vide antè*, § dclxx.

(*t*) So *Paul Voet*, *De Stat.* Sect. ix. c. ii. 11, cited *Rocco*, p. 344: "Hinc ratione *effectûs* et *complementi* ipsius contractûs, spectatur ille locus, in quem destinata est *solutio*."

(*u*) *Vide antè*, § dclvii.

(*x*) *Burge*, *ubi sup.*

(*y*) *Ballantine* v. *Golding*, 1 *Cooke*, *Bankr. Laws* (8th edit.) p. 487. *Hunter* v. *Potts*, 4 *Term Rep.* p. 182.
Potter v. *Brown*, 5 *East*, *Rep.* [per Lord Ellenborough at] p. 130.
[*Blanchard* v. *Russell*, 13 *Massachusetts Rep.* at p. 7.]

(*z*) 2 *Best & Smith*, *Rep.* p. 743 (A.D. 1862).

debts by the insolvent Law of the colony. The replication to this plea was:—

(1) That when the debts were contracted, the plaintiff was resident in England, and that at the time of the commencement of the suit the defendant was resident in England [out of the jurisdiction of the Supreme Court of Victoria].

(2) That by virtue of the contracts by which the debts became payable, they ought to have been paid to the plaintiff in England. It was holden, that the replication showed no answer.

Lord Chief Justice Cockburn, in delivering the judgment of the Court of Queen's Bench (*a*), said: "On this "state of the record it must be taken that the debt sued "on was contracted in the colony of Victoria, and payable "there; and there is a plea of discharge under the Law "of that colony. The rule adopted by Lord Ellenborough "in *Potter* v. *Brown* (*b*), after the cases of *Ballantine* v. "*Golding* (*c*), and *Hunter* v. *Potts* (*d*), viz. 'That what "'is a discharge of a debt in the country where it was "'contracted is a discharge everywhere,' applies to a "discharge by a Court in a foreign country; *à fortiori*, it "applies to a discharge by a Court in one of the British "colonies."

The same principle was applied to the discharge of an obligation arising *ex delicto* in the case of *Phillips* v. *Eyre* (*e*).

And it is to be observed that the English authorities, as well as the continental, maintain the universality of the rule, and recognize in its application no distinction [whether the discharged contract was made between

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(*a*) *Wightman, Crompton, and Blackburn, JJ.*, concurred.
(*b*) 5 *East, Rep.* at p. 130.
(*c*) *Cooke, ubi sup.*
(*d*) 4 *Term Rep.* p. 182.
(*e*) *L. R.* 4 *Q. B.* p. 225; 6 *Q. B.* p. 1. *Vide infrà*, chap. xlviii.

citizens, or between a citizen and a foreigner, or between foreigners]. And on the whole the same doctrine may be said to be maintained by the United States (*f*).

DCCLXXXVIII. The only limitation to this rule is that which has been before adverted to (*g*), and which accompanies all questions of comity; viz. the discharge of the obligation must of course not contravene the plain principles of justice, or be manifestly injurious to the clear and fair rights of the native subject whose state is called upon to recognize the validity of the discharge. "Thus "if any state," says a great American judge (*h*), "should "enact that its citizens should be discharged from all "debts due to creditors living without the state, such a "provision would be so contrary to the common principles "of justice, that the most liberal spirit of comity would "not require its adoption in any other state" (*i*).

DCCLXXXIX. It appears, too, that the rule *e converso* is applicable; namely, that a discharge of a contract by the Law of a place where the contract was not to be performed ought not to operate as a discharge in any other state.

This rule has been firmly established by judicial decisions in Great Britain and in the United States (*j*).

DCCXC. As to *the form* of the discharge or payment;

(*f*) *Story*, s. 340.

(*g*) *Vide suprà*, §§ xii–xv.

(*h*) Chief Justice Parker, in *Blanchard* v. *Russell*, 13 *Massach. Rep.* at p. 6.

Story, ss. 349, 350, 351.

(*i*) To the same effect is the case of *Wolfe* v. *Oxholme*, 6 *Maule & Selwyn*, *Rep.* p. 92; though, in my judgment, as I have already ventured to observe, the principle of Law was wrongly applied to the act of a belligerent state. *Vide antè*, vol. iii. §§ lxxxvii., dlxxvi.

(*j*) *Smith* v. *Buchanan*, 1 *East*, *Rep.* [per Lord Kenyon, at] p. 11.

Lewis v. *Owen*, 4 *Barnewall & Alder*. *Rep.* p. 654.

Phillips v. *Allan*, 8 *Barnewall & Cress*. *Rep.* p. 477.

Bell, *Comm.* book vi. part ii. chap. v. 49 (vol. ii. p. 379, ed. of 1870).

Story, s. 342; he says, "where the contract was not made or to be performed."

according to sound principles of International Jurisprudence, a discharge in the form which is valid in the place where it is given ought to be holden valid [in point of form] everywhere, although another form would be required by the Law of the place in which the obligation was contracted to be fulfilled. It is, as Massé (*k*) says, "une *suite* de la convention," not one of its *mediate* or *immediate effects*; it is an *ex post facto* act, evidently governed by the local Law. Story (*l*) says, "The reasonable interpretation of the general rule would seem to be, "that while contracts made in one country are properly "held to be dissoluble and extinguishable according to "the laws of that country, as natural incidents to the "original concoction of such contracts, they are and may "at the same time also be equally dissoluble and extinguishable by any other acts done or contracts made "subsequently in another country by the parties, which "acts or contracts, according to the Law of the latter "country, are sufficient to work such a dissolution or "extinguishment."

So in *Warrender* v. *Warrender* (*m*), a case before referred to in this treatise, Lord Brougham said: "If a "contract for a sale of a chattel is made, or an obligation "of debt is incurred, or a chattel is pledged in one "country, the sale may be annulled, the debt released, "and the pledge redeemed by the Law and by the forms "of another country in which the parties happen to reside, and in whose courts their rights and obligations "come in question, unless there was an express stipulation in the contract itself against such avoidance, "release, or redemption." His Lordship continues— "But, at any rate, this is certain, that if the laws of one "country, and its courts, recognize and give effect to

(*k*) *Massé, ubi sup.* num. 127 (ed. 1844), num. 612 (ed. 1874).
(*l*) S. 351 *c.*
(*m*) 9 *Bligh, New Rep.* at p. 125.

" those of another, in respect to the constitution of any " contract, they must give the like recognition and effect " to those same foreign laws when they declare the same " kind of contract dissolved " (*n*).

DCCXCI. On principle, therefore, the discharge of an obligation, according to the form of the *lex loci* in which it is discharged, ought to be treated as a discharge everywhere. Thus, in the case put by Story of a bond executed in England for the payment of money, if payment be made in France, and a discharge given in that country under a written but unsealed instrument, which would certainly be holden valid in France, it ought to be holden valid in every third country, and it ought also to be holden valid even in England. " For " (Story argues) " if the contract derives its whole original obligatory " force from the Law of the place where it is made, it is " but following out the same principle to hold, that any " act subsequently done, touching the same contract by " the same parties, should have the same obligatory force " and operation upon it, which the Law of the place, " where it is done, attributes to it " (*o*). Story does not see any reason why, in this respect, there should be any difference between those contracts which affect personal property only, and those which impose a charge upon real property. This doctrine of the *indirect* effect of a discharge according to the *lex loci* of liens on immoveable property, is not inconsistent with the proposition that the *lex situs* governs *directly* the rights to such property; and he quotes with approbation the following remarks of Lord Brougham in *Warrender* v. *Warrender*:—" All personal " obligations may, in their consequences, affect real " rights in England; nor does a Scotch divorce, by " depriving a widow of dower or arrears of pin-money,

(*n*) This is according to the maxim, fully adopted by the English Law, " Eodem modo quo quid constituitur, eodem modo dissolvitur.

(*o*) Ss. 351 *a*, 351 *b*.

"charged on English property, more immediately affect "real estate here, than a bond or a judgment, released in "Scotland according to Scotch forms, discharges real estate "of a lien; or than a bond executed or, indeed, a simple "contract debt incurred in Scotland, eventually and con- "sequentially charges English real estate" (*oo*).

DCCXCII. It may be proper, however, to observe here, that, with respect to what are termed, in English Law, *executory contracts*, respecting real or immoveable property, the English, Scotch, and United States Courts pronounce, *uno ore* (*p*), that they are governed exclusively by the *lex situs*. Considerable difference of opinion upon the subject prevails among foreign jurists (*q*).

On the other hand, the great majority of foreign jurists agree with the English and Scotch authorities in holding that contracts respecting personal property, such as debts, and the like, have no fixed *situs*, but follow the person of their owner (*r*).

DCCXCIII. The cases considered in the foregoing paragraphs relate to the actual, *substantial* discharge of the obligation, according to its true intent and meaning, though according to a form unknown to the *lex loci* in which the obligation was contracted.

The obligation, however, may be otherwise discharged. The obligor and obligee may consent that the obligation shall be dissolved; or the obligee may freely release the obligor from the bond; or the obligation may be discharged, as has been stated, by the introduction of a new obligation between the same obligor and obligee (*novatio*); or by the obligor and obligee, or debtor and creditor, becoming the same person (*confusio*). In [the first-mentioned] cases a

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(*oo*) *Story*, s. 351 *d*. 9 *Bligh*, *New Rep.* at p. 127.
(*p*) *Story*, ss. 363, 365.
(*q*) *Ib.* s. 368.
(*r*) *Ib.* s. 362.
Vide antè as to Savigny's opinion [§ dcclxxvi.].

new obligation, or a new contract, supersedes and dissolves the former.

This new obligation, or contract, is to be governed by the same rule as the former one, that is, by the Law of the place in which it is to be fulfilled.

DCCXCIV. We have been considering what Law shall govern with reference to cases in which the discharge of the obligation has been effected by the *acts of both the parties* to it. But there remains the difficult question as to what law shall govern the discharge of the obligation, without the consent of the obligee, *in invitum*, by the mere *operation of the law*.

It was mentioned in a former chapter, that the discharge of an obligation might be effected by the operation of law without the consent of the obligee in the case of an adjudication in bankruptcy (*s*). In that chapter, the discussion of the principles by which such a discharge was effected was necessarily anticipated.

It remains to add a few remarks upon this mode of discharge.

DCCXCV. According to the old Roman Law, the debtor was liable to imprisonment and to the disgrace (*infamia*) consequent on the seizure and sale of all his property; in order to avoid the severity of this, a law was passed, or a practice arose, dating from the time of Sylla or Julius Cæsar, which protected the debtor whose insolvency had been caused by misfortune from the severity of the old Law, on the condition of his voluntarily surrendering all his property.

This act of surrender was called the *cessio bonorum* (*t*); it would seem also to have been attended by this advantage, that if the debtor acquired property, subsequently to the *cessio*, his creditors could not seize upon the whole of it, but

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(*s*) *Vide antè*, chap. xxxix.

(*t*) *Dig.* lib. xlii. t. iii. *De cessione bonorum.*
Cod. lib. vii. tit. lxxi. *Qui bonis cedere possunt.*

could only compel him to pay a portion: "ex integro in id "quod facere potest creditores cum eo experiuntur; in- "humanum enim erat spoliatum fortunis suis in solidum "damnari" (*u*).

The *cessio* might be made judicially in court, or by a declaration out of court, at the will of the debtor, communicated by a letter or messenger.

The creditors to whom the *cessio* was made were not allowed to retain and divide the property, but were compelled to sell it to the highest bidder. After the sale, but not before, the debtor was divested of the *dominium* over his property. As soon as the *cessio* was announced, a *curator* (*x*) was appointed, who undertook the care and administration of the property previously to its sale, and by whom all actions competent to the debtor were enforced.

The *cessio bonorum*, it should be always remembered, properly speaking, operated as a discharge of the debtor; it did not take away, but only suspended, the right of the creditor to bring an action against his effects (*y*).

DCCXCVI. The doctrines of the Roman Law upon the *cessio bonorum* have been introduced into the jurisprudence of the continent, especially of Holland, Spain, and France; and it is more or less blended in these countries with the modern law of bankruptcy, which affords a permanent discharge to the debtor from his obligations to his creditors.

DCCXCVII. The following principles upon this subject appear to have obtained the approval of most civilized states (*z*):—

i. If the proceedings consequent on the bankruptcy only

(*u*) *Inst.* lib. iv. t. vi. 40.
Cf. Dig. lib. xlii. t. iii. 4.

(*x*) *Dig.* lib. xlii. t. vii. (*De curatore bonis dando*) 2: "De curatore constituendo hoc jure utimur, ut Prætor adeatur, isque curatorem curatoresve constituet ex consensu majoris partis creditorum: vel Præses Provinciæ, si bona distrahenda in Provinciâ sunt."

(*y*) *Dig.* lib. xlii. t. iii. 7.

(*z*) *Burge*, vol. iii. p. 924 (part ii. chap. xxii.)

release the *person* of the debtor, and not his *debt*, the debt may be satisfied by the seizure of his future property in a State other than that in which the bankruptcy took place.

ii. If they discharge the *debt*, and if the state in which the bankruptcy took place be also the place of the obligation, then, but not otherwise, according to English, Scotch, French, and North American jurisprudence, the discharge is available against an action in any foreign state.

DCCXCVIII. The following case, decided by the Privy Council in England, illustrates the working both of the French and English Law on this question of comity. Quelin, the appellant, had been declared a bankrupt by a judgment of the Tribunal of Commerce at Nantes, on the 20th January, 1823. He obtained a protection from arrest (*sauf conduit*), but afterwards absconded to Jersey. In his absence he was prosecuted for a fraudulent bankruptcy, and was condemned *par contumace* to five years' imprisonment and hard labour (*travaux forcés*). Previously to his bankruptcy, he had given a note of hand for 7,000 francs (*billet à ordre*) to a widow of the name of Nau, in Nantes. She proved the amount of this note as a debt under the bankruptcy, but did not attend the meeting for the appointment of an assignee (*syndic définitif*) and banker, and afterwards indorsed the note over to a third person, who indorsed it to the respondent, the plaintiff in the court below, an inhabitant of Jersey. He sued the appellant for the amount of the note in the Royal Court there. The appellant pleaded his bankruptcy in France in bar of the action, and on his plea being overruled he appealed to the Privy Council. Their Lordships ordered the following questions to be referred to two French advocates, to be named by the British ambassador at Paris:—1st. Whether a person whose property had passed to Syndics under the Law "*de la faillite*" could afterwards be sued by any creditor, who had proved his debt before the Syndics? 2nd. If, generally, such person could not afterwards be sued by such a creditor, did he lose that protection by a sentence *par contumace*, and

by competent judges, for not having been able to give a proper account of his receipts and disbursements, for having misapplied several sums of money and other property to the prejudice of his creditors, for having concealed his books, or not having kept them, and for having violated the *sauf conduit* granted him by the Tribunal of Commerce? The ambassador made choice of Messrs. Delagrange and Dupin aîné, and they having given their opinion upon the first point, "that the bankrupt could not be sued even by a "creditor who had not proved his debts before the Syndics, "and *à fortiori* could not be sued by one who had proved;" and upon the second, "that the sentence, *par contumace*, "would not have any effect so as to give a new right to sue "to a creditor;" their lordships, on the 23rd of February, 1828, reversed the judgment of the court below (*a*).

DCCXCIX. The Privy Council, however, have decreed that a certificate obtained under an English bankruptcy is a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident in Calcutta (*b*).

DCCC. In accordance with the principle stated above, (§ dccxcvii.) the Scotch Court of Session held that where a debt had been contracted in Berbice, and a commission of bankruptcy had been issued in England against the debtor, under which he had been declared a bankrupt, and afterwards had obtained his certificate, such certificate was no bar to an action brought by the creditor against the heir of the debtor (*c*).

(*a*) *Quelin* v. *Moisson*, cited in next case.

(*b*) *Edwards* v. *Ronald* (1830), 1 *Knapp's P. C. Rep.* p. 266.

This seems to have been decided on the ground of the power of imperial legislation to bind all Colonial Courts, which are in this respect not to be considered as foreign Courts. See *Ellis* v. *McHenry*, *L. R.* 6 *C. P.* p. 228.

(*c*) *Rose* v. *Macleod*, 4 *Shaw & Dunlop* (*Court of Session Cases*), p. 311; cited *Burge*, vol. iii. p. 926.

DCCCI. *Prescription* is another mode by which obligations are ended. When the law of prescription of the place in which the obligation is to be fulfilled differs from the law of the place in which the action is brought to enforce the performance of it, which ought to prevail? There has been considerable difference of opinion on this subject; but the preponderance of reasoning and authority seems to be against the principle maintained by English Law. According to all true principles, Savigny says, the law of the place of the performance shall prevail (*d*). The reasons upon which the Law of prescription is founded are intimately connected with the nature of the obligation; and, apart from this ground of theoretical justice, the practical equity of the doctrine is obvious. It takes from each of the parties all power of making an arbitrary selection which may be injurious to the other. So in the case of a variety of jurisdictions to which recourse might be had, it prevents the injustice which the plaintiff might commit, by selecting that which recognizes the longest term of limitation; and it will not allow the defendant, by transporting his domicil within the jurisdiction which recognizes the shortest term of limitation, to defraud the plaintiff. The time of prescription has been immutably fixed for both, at the time of the contract, by the Law of the place in which it is agreed that it shall be fulfilled. The opinion of Savigny is supported by many and weighty authorities (*e*), and by the decision of the principal court of his own country (*f*).

DCCCII. On the other hand, the doctrines that pre-

(*d*) *Savigny, R. R.* viii. s. 374. ["Nach der richtigen Lehre muss das örtliche Recht der Obligation über die Verjährungszeit entscheiden, nicht das des Klageorts." See also] *R. R.* v. s. 237.

(*e*) *Hertius, De Collisione Legum*, § 65.

Schäffner, § 87.

Wächter, Die Collision, &c., Archiv, Band xxv. 408-412. He cites various authors.

(*f*) [Berlin Court of Revision], 1843; *Seuffert, Archiv*, Band ii. num. 120.

scription is governed by the *lex fori*—that it is a question of *procedure*—that it relates to the *remedy*, not to the *nature* of the obligation—that it is among what jurists call the *ordinatoria* and not the *decisoria litis*, are propositions also maintained by jurists, and now incorporated into the Law of England, of Scotland, and of the North American United States (*g*); but upon reasoning which, as it would seem to the writer of these pages, Mr. Westlake (*h*) properly says, confounds the *interpretation* of the contract with the operation upon it of the *lex loci contractûs*, and which admits that the debt may be still supposed to be existent and owing, against which it nevertheless opposes the prescriptive bar of the *lex fori*.

DCCCIII. The foregoing decisions of the English courts, and those which agree with them, have at present only established this doctrine, that prescription is governed by the *lex fori*, with reference to cases in which the prescription of the place of the contract *barred the remedy*, but did not *extinguish the claim*. Does not this latter kind of prescription at least appertain to the "*decisoria*," and not to the "*ordinatoria* litis et causæ?" No decision, indeed, of the English or United States Courts has established as yet this proposition in its full extent. The

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(*g*) *Burge*, vol. iii. p. 878 *et seq.*

Story, s. 576, cites *Boullenois*, tome i. p. 530; *sed cf. Fœlix*, liv. ii. tit. i. s. 100, who shows that both Boullenois and Pardessus limit the application of this doctrine to a case in which the parties have not fixed any place for the performance of the contract.

Don v. *Lippmann*, 5 *Clk. & Fin. Rep.* p. 1; *Fergusson* v. *Fyffe*, 8 *ib.* p. 121; leading English and Scotch cases. See also *Ruckmaboye* v. *Lulloobhoy Mottichund*, 8 *Moore P. C.* p. 4; 5 *Moore, Ind. Appeal*, p. 234.

(*h*) Page 233, § 250 (1st edit.). See §§ 223, 224 (2nd ed. 1880).

Fœlix (s. 100) for himself says, "Lorsqu'il s'agit non pas de statuer sur le fond de la demande, mais d'apprécier des *défenses*, qui y sont opposées, et qui ont leur base dans la loi du lieu où siége le tribunal saisi de la cause, on suivra cette dernière loi." Demangeat shows that Fœlix has made a mistake here, and predicated of *défenses* what was true of *exceptions*. Demangeat entirely agrees with Savigny.

opinion and reasoning, however, both of Story (*i*) and Burge (*j*), and the judgment of the English Court of Common Pleas (*k*), have sustained the proposition to this extent—viz. that if the statutes of limitation of the state in which the contract is to be performed extinguish the right, and declare it to be absolutely void after the lapse of a prescribed period, and the parties have been during that period resident within the jurisdiction of the state, then even the law of England will consider this prescription as extending both *ad valorem contractûs* and *ad decisionem litis*, and respect it accordingly.

DCCCIV. The larger proposition, however, mentioned above, may perhaps be deemed still open for discussion before tribunals which administer the law of England: and perhaps upon a fuller and further consideration it may be found that the residence of the parties subsequent to the making of the contract cannot really affect the true question, namely, whether an *extinctive prescription*, at least, incident to the Law of the place of the fulfilment of the obligation, be not a matter which concerns the

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(*i*) S. 582.

(*j*) Vol. iii. pp. 883, 884.

(*k*) *Huber* v. *Steiner*, 2 *Bingham's New Cases*, p. 202. [See *Alliance Bank of Simla* v. *Carey*, *L. R.* 5 *C. P. D.* p. 429; and cf. *Hendricks* v. *Comstock*, 12 *Indiana Rep.* p. 238.]

Bell [(*Principles of the Law of Scotland*, §§ 586, 587, edit. 1885)] observes: "The mere lapse of time in some cases bars action on an obligation; in others it extinguishes the obligation entirely. But in order correctly to mark the principle on which this doctrine proceeds, it is necessary to distinguish between Limitation properly speaking, and what more correctly is called Prescription. Limitation is a denial of action on an instrument or document of debt, after the lapse of a certain time, without regard to the actual subsistence of the debt; . . . Prescription is a legal presumption of abandonment or of satisfaction, and so extinguishes the debt; . . . This distinction is grounded on a real difference in principle, and . . . it enters into all arguments on the more nice and difficult questions in this department. Limitation of action is either by convention or by statute: the former being a condition in the obligation, the latter established on grounds of public expediency."

nature and essence of the obligation itself; whether it was not a condition provisionally contemplated by the parties at the time when the obligation was incurred. The very learned and accomplished editor of the English "Leading Cases" thus expresses himself on this point:—"Suppos- "ing the law of a foreign country to be, that a contract "is, after a certain time, to be deemed absolutely ex- "tinguished, it seems not quite reasonable to say that the "removal of the parties out of the jurisdiction, while "that time is running, should authorize the courts of this "country to consider it *in esse* after the period prefixed. "The authorities establish, that the Law of the country "where the contract is made must govern it, and must "be looked on as impliedly incorporated with it. Now, "if the contract had contained a proviso that it should be "absolutely void, if not enforced within a certain time, "no doubt the English courts would hold it void after "the expiration of that time. But what difference can "it make that such proviso is implied from the Law of "the country where the contract was made, instead of "being expressed in terms? Is it not in both cases "equally part of the contract? If, indeed, the rule of "the foreign Law be, that the contract shall, after the "lapse of a certain time, become void, provided that the "parties to it continue to reside all that time in the same "country, the arrival of the period prefixed, or its avoid- "ance, will depend on the contingency of their abstaining "from absenting themselves; and, if they leave the "country, never will arrive at all; and this is, perhaps, "what Judge Story intends by the words, 'that the "'parties are resident within the jurisdiction during all "'that period, so that it has actually *operated upon* the "'case.' For if the Law be so framed as to operate "upon the case without such residence, the qualification "appears to be inapplicable" (*l*).

(*l*) *Smith's Leading Cases*, vol. i. p. 678 (ed. 1887). Notes to

DCCCV. The Supreme Court of the United States of America has, however, certainly laid down the rule that the statute of limitations of the country, in which the suit is brought, may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractûs* cannot be so pleaded. It considers that this has become a fixed rule of the *jus gentium privatum*, unalterable either in the United States or in England, except by legislative enactment (*m*).

But the same court has recognized, as the inferior courts of the same country had done before, the distinction between a law of limitation which went directly to the extinguishment of the debt, claim, or right, and one which operated merely as a bar to the remedy (*n*).

DCCCVI. A case was brought before Sir William Grant, arising under a possessory law of Jamaica, which converted a possession of seven years under a deed, will, or other conveyance, into a positive absolute title against all the world, without exception in favour of any one, or of any right, however the party claiming may have been situated during that time, or whatever the previous right of property may have been. The great English judge took in this case the distinction between statutes which barred the remedy, and statutes which prohibited the bringing a suit after a limited time (*o*).

DCCCVII. The foreign jurisprudence upon this matter is perspicuously stated by Massé (*p*).

Mostyn v. *Fabrigas*. [In *Pitt* v. *Dacre*, *L. R.* 3 *Ch. D.* p. 295, it was decided that as to charges on real estate situate abroad, the *lex loci rei sitæ*, and not the English Statute of Limitations, must be applied.]

(*m*) *Townsend* v. *Jemison*, 9 *Howard*, (*Sup. Ct. U.S.A.*) *Rep.* p. 407.

(*n*) *Ibid.* at pp. 418, 419; see *Shelby* v. *Guy*, 11 *Wheaton*, *Rep.* p. 361; *Brent* v. *Chapman*, 5 *Cranch*, *Rep.* p. 358; *Lincoln* v. *Battelle*, 6 *Wend.* p. 475; *Story*, s. 582.

(*o*) *Beckford* v. *Wade*, 17 *Vesey*, *Rep.* p. 87.

(*p*) *Droit Comm.* num. 74 (ed. 1844); liv. ii. tit. ii. num. 559 (ed. 1874).

There have been various systems :

i. That which governs the prescription—by the law of the domicil of the creditor or obligee ;

ii. By the law of the [domicil of the] debtor or obligor ;

iii. By the law of the place in which the demand for the fulfilment is made ;

iv. By the law of the place where the contract is made ;

v. By the law of the place of payment, or discharge.

DCCCVIII. Pothier (*q*) alone countenances the first system. Burgundus (*r*) and Merlin (*s*) expose the error on which his specious reasoning is founded.

The second system is supported by Merlin (*t*) and John Voet (*u*), and by decisions of the superior courts of Cologne and Berlin (*x*) : but what if the debtor or obligor change his domicil ? of which domicil is the law to be followed—that of the domicil at the time of making the contract, or that of the subsequent domicil ?

The third system is supported by Huber (*y*), on the ground that " præscriptio et executio non pertinent ad " valorem contractûs, sed ad tempus et modum actionis " instituendæ, quæ per se quasi contractum separatumque " negotium constituit."

The fourth system is far preferable to the third (*z*), for it avoids the deplorable consequence of allowing the creditor or obligee to vary, according to his pleasure, the length of time of the prescription, which contradicts, by rendering prescription uncertain, the very end of all prescription ; for, as Hertius says, " si actioni non nisi

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(*q*) *De la Prescription*, partie ii. art. v. § 251.
(*r*) *Ad consuetud. Flandriæ*, *2de traité*, n. 23.
(*s*) *Rép.* Prescription, sect. i. § iii. num. 7.
(*t*) *Ubi sup.*
(*u*) *Pand.* lib. xliv. t. v. n. 12.
(*x*) *Fœlix*, s. 100.
(*y*) *De Confl. Legum*, n. 7, *De jurispr. univers.* lib. iii. ch. xi. § 34.
(*z*) Supported by *Rocco*, lib. iii. cap. xv. p. 375.

" secundum leges, ubi judicium instituitur, præscriberetur, " interdum incertissima forent præscriptionis tempora, " quoniam unus homo diversis locis non rarò potest con- " veniri " (*a*).

Nevertheless, Massé rightly pronounces against this fourth system, for prescription is really connected with the execution or fulfilment of the obligation to which it opposes itself as a bar.

The fifth system, therefore, is the right one; it causes the law of the place of fulfilment to prevail when that place is indicated; that of the domicil of the debtor or obligor when it is not, for there the obligation is in that case to be fulfilled. Troplong, Demangeat (*b*), and, as we have seen, Savigny, agree with Massé; and so, as it would seem, does also the reason of the thing.

DCCCIX. It is a maxim of universal jurisprudence that if the obligee or creditor refuse to receive his due when tendered to him, the debtor or obligor is not to suffer by his caprice, but is entitled to the discharge of his debt or obligation. According to the Roman Law, the debtor must make an offer (*oblatio*) of capital and interest at the place appointed for payment; this, if refused, was followed by a solemn act of depositing the sum, by a *sealing up* (*obsignatio*), either *apud ædem sacram* or *in tuto loco*, and by the discharge of the obligation. " Obsignatione totius debitæ pecuniæ solenniter factâ, " liberationem contingere manifestum est;" then follows a condition of importance to the present subject, " Sed ita " demum oblatio debiti liberationem parit, si *eo loco quo* " *debetur solutio fuerit celebrata* " (*c*).

Story (*d*) observes, that a defence or discharge good by the Law of the place where the contract is made, or

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(*a*) *De Collis. Leg.* § 65.
(*b*) *Fœlix*, s. 100, note (*a*) *ad finem.*
(*c*) *Cod.* lib. viii. t. xliii. 9.
(*d*) Ss. 331, 332.

is to be performed (he means the latter), is good everywhere; so, he observes, say John Voet, Casaregis, Huber, Burgundus, and Dumoulin. Thus infancy, if a valid defence by the *lex loci contractûs*, is valid everywhere. A tender and refusal good by the same Law, either as a full discharge, or as a present fulfilment of the contract, will be respected everywhere (*e*).

(*e*) *Story*, s. 332; *Male* v. *Roberts*, 3 *Espinasse*, *Rep.* p. 163. *Vide post* as to payment of Bills of Exchange, chap. xlii.

In vol. i. of the *Journal du Droit intern. privé*, it is observed as to the Tribunal of the German Empire: "Les décisions rendues jusqu'ici par le Tribunal de l'Empire ne présentent pas de réponse précise à la difficile question de savoir si la portée et la force juridique d'une obligation contractuelle doivent être appréciées d'après la loi du lieu de la naissance du contrat, celle du lieu de son exécution, ou celle du domicile de ceux qui l'obligent. En effet, d'un côté l'avis du Tribunal ne présente aucune hésitation, parce que les lois des différents lieux ou de plusieurs s'accordent entre elles (jugements des 11 Mars, 1873, vol. ix. p. 371; 25 Juin, 1872, vol. vii. p. 2; et 23 Avril, 1872, vol. vi. p. 78); d'un autre côté le Tribunal n'a réellement examiné dans plusieurs cas que jusqu'à quel point les contractants avaient eu l'intention de se soumettre à la loi d'un lieu déterminé."—Page 132.

CHAPTER XLI.

LEX MERCATORIA.

DCCCX. The *Lex Mercatoria* (*a*) is so important a branch of Private International Law, that it has seemed to the writer of these pages expedient to treat it apart from the general law on obligations which have been the subject of preceding chapters. It is proposed to consider it under the two following divisions, which, though they do not perhaps entirely exhaust the subject, supply principles applicable to every part of it (*b*).

1. *The general Maritime Law*; which will include the right of Stoppage *in transitu*.

2. The mode of carrying on business by *Bills of exchange*.

DCCCXI. 1. "The maritime law," Lord Mansfield

(*a*) "To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the customs of merchants, or *lex mercatoria*; which, however different from the general rules of the common law, is yet engrafted into it and made part of it; being allowed for the benefit of trade to be of the utmost validity in all commercial transactions; for it is a maxim of law that 'cuilibet in suâ arte credendum est.'"—*Blackstone's Comment.* vol. i. introd. sect. iii. p. 75. [See *Dr. Wendt's Papers on Maritime Legislation*, 3rd ed. 1888, Introduction, pp. xxiii–xxix.]

(*b*) The Law Merchant is a system founded on the rules of equity and governed in all its parts by plain justice and good faith.

Master v. *Miller*, 4 *Term Rep.* at p. 342, per Buller J.

Lennig v. *Ralston*, 23 *Pennsylvania State Rep.* p. 137 (1854).

Bell, Commentaries (7th edit.), book iii. part i. ch. iv. "Of Maritime Contracts."

Story, Conflict of Laws, ss. 286 *b*, 384, 385, 391–402 *a*; see, too, s. 322 *b in fine* (referring to a bottomry bond), 323, note, 327 *a*, 327 *b*.

justly observed, "is not the law of a particular country." Upon the same principle, Thöl (*bb*), the most learned of modern foreign writers upon mercantile laws, treats his subject as embracing "partly the commercial legal rela- "tions between individuals—Private mercantile or com- "mercial law (*Privathandelsrecht*); partly mercantile or "commercial legal relations between government and "subjects—Public commercial or mercantile law (*Oeffent- "liches Handelsrecht*); partly commercial or mercantile "legal relations between different states—International "mercantile or commercial law (*Handelsvölkerrecht*)" (*c*).

The recognition of this general maritime law is, as will be seen, especially remarkable in the cases of tort, arising from collision between ships, one or both of which belong to a foreign state, upon the high seas.

DCCCXII. The sources of this *Lex Mercatoria* (and the observation applies to both divisions of the subject mentioned above) spring from the usage of maritime states, founded on the necessities of commerce, upon the natural rights and obligations which, independently of municipal law, grow out of commercial intercourse; upon the reasonings of accredited writers upon this branch of jurisprudence, which reasonings have been built up, by judicial decisions in England, into a fabric of municipal commercial law. In other countries the same effect has been produced by the incorporation into codes of the leading principles previously established upon the authority of jurists. In England also, during the last few years, a commercial [maritime] code has in fact been created, though it has assumed the technical form of an Act of Parliament (*d*).

DCCCXIII. So far as these codes and statutes incor-

(*bb*) *Das Handelsrecht, von Dr. Heinrich Thöl*, Göttingen, 1854, vol. i. pp. 1, 2.

(*c*) Or, "*Particulãres, gemeines, allgemeines, Handelsrecht.*"

(*d*) 17 & 18 Vic. c. 104, The Merchant Shipping Act, 1854, amended by subsequent statutes.

porate the general maritime jurisprudence, no injury is done to Private International Law; but when they incorporate some principle of domestic or municipal policy at variance with that Law, there is danger of a conflict and collision between the interests of one state and those of the general community of states, which may lead both to individual injustice, and to a disturbance of the amicable relations of independent nations.

DCCCXIV. Illustrations of this danger and inconvenience may be easily furnished. The English Merchant Shipping Act (*dd*) provides that in certain circumstances the property of a ship may be changed at home while she is navigating the ocean, and of course, therefore, without any papers on board evidencing the change of ownership. It may happen, however, that the ship, which has undergone such change of ownership at home, is subsequently sold abroad by the master as agent for the former proprietor. It is very probable that in such a case the foreign court would disregard the peculiar law of England, and adhere to the general maritime law of Europe. Such appears to have been the reasoning of the Civil Tribunal of Havre, in the case of the *Ann Martin* (*e*): "Attendu "que la nature de ce contrat qu'on a qualifié de mortgage, "d'après la loi anglaise, est peu importante au procès; "que, soit qu'il constitue une vente réelle ou une simple "vente apparente, ou un nantissement accompagné de "certains priviléges particuliers dérivant de la législation "étrangère sous l'empire de laquelle il a été souscrit, la "décision doit être la même; qu'il s'agit, en effet, de la "propriété d'un navire navigant sous le nom de *Clauss et* "*Comp.*; qu'il est impossible d'admettre que, sous une

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[(*dd*) 17 & 18 Vic. c. 104, ss. 55, *et seq.*]

(*e*) April 19, 1856, taken on appeal to the Court of Appeal at Rouen, but the judgment was affirmed. The extract is from the appendix to the case of *Castrique* v. *Imrie* in the House of Lords, reported *L. R.* 4 *H. L.* p. 414. *Vide post*, § dcccxliv.

" législation commerciale quelconque, il soit reçu qu'en " cours de voyage cette propriété puisse être transmise à " un tiers, ou lui être engagée à titre de nantissement, " sans qu'aucune trace de cette mutation ou de cette " modification de propriété soit imprimée aux papiers du " bord ; que la bonne foi qui est l'âme du commerce " répugne à une semblable idée " (*f*).

DCCCXV. On the other hand, the English High Court of Admiralty, supported by the Judicial Committee of the Privy Council, was careful during the existence of the old law, and before the establishment of the International [Regulations mentioned hereafter], never to apply to a foreign vessel the rules of navigation prescribed by statute for British vessels. In all cases of collision upon the high seas or in foreign waters, between a foreign and English vessel, or between two foreign vessels, the wrongdoer, whether he were foreigner or English subject, was ascertained by a reference to the old rule of the sea, founded on the principle of general maritime law, and not to the rule prescribed by the English statute (*g*). Cases of Collision, like cases of Salvage, are considered as belonging to the *jus gentium* (*h*).

(*f*) This doctrine accords with that laid down by Mr. Justice Martin in *Arayo* v. *Currell*, 1 *Louisiana Rep.* p. 528. *Vide infrà*, § dcccxxi., as to authority of master as agent. [See *Hooper* v. *Gumm*, *L. R.* 2 *Ch. App.* p. 282.]

(*g*) *Cope* v. *Doherty*, decided by V.-C. Page Wood (1858) ; affirmed on appeal before the Lords Justices.—4 *K. & J.* p. 367 ; 2 *De G. & J.* p. 614 ; 4 *Jur. N. S.* pp. 451, 699.

[*The Wild Ranger*, *Lushington*, p. 553.]

The Zollverein, *Swabey*, *Adm. Rep.* p. 96.

The Dumfries, *ib.* pp. 63, 125.

The General Steam Navigation Co. v. *Guillon*, 11 *Mee. & Wel. Rep.* p. 877.

[So, too, the municipal law of the country of the foreign ship is not allowed to prevail over the general maritime law, in an action of damage for collision on the high seas, even where the action is brought *in personam*. *The Leon*, *L. R.* 6 *P. D.* p. 148.]

[(*h*) See *The Johann Friedrich*, 1 *W. Robinson*, p. 35.]

[DCCCXV.A. The Merchant Shipping Act Amendment Act, 1862 (*hh*), contained a table of regulations for preventing collisions at sea, and empowered the Queen in Council to alter these regulations from time to time, on the joint recommendation of the Admiralty and the Board of Trade; and also to direct that they should apply to the ships, whether within British jurisdiction or not, of any foreign country consenting thereto. The first code drawn up under these powers was that of June 1, 1863, agreed upon in consultation with France, and differing but little from the table contained in the British Act (*i*).

The Regulations at present in force were established by an Order in Council of August 14, 1879, and came into operation on September 1, 1880; except Article 10 (relating to fishing vessels and open boats), which was from time to time suspended, and has now been modified by subsequent Orders in 1884 and 1885 (*ii*). Most of the maritime nations of the world have adopted these Regulations (*j*), which have therefore the character of an International Code (*jj*).]

[(*hh*) 25 & 26 Vic. c. 63. See ss. 25 & 58.

(*i*) *London Gazette*, January 13, 1863, p. 188.

(*ii*) *Ibid.* August 19, 1879, p. 5032; April 9, 1880, p. 2434; February 8, 1884, p. 582; August 22, 1884, p. 3813; January 2, 1885, p. 4; June 30, 1885, p. 2988.

(*j*) *Parliamentary Papers*, 1880, No. 250, Session II. *London Gazette*, August 19, 1879, p. 5032; September 17, 1880, p. 4941; December 14, 1880, p. 6723.]

[(*jj*) A difficult international question, touching the enforcement of the Regulations, arose out of a collision that took place in January, 1875, between the Portuguese steamer *Insulano* and the British steamer *City of Mecca*. The owners of the latter vessel having been sued for damages in Portugal, the courts there placed upon certain articles of the table of Regulations, which was then in force and had been adopted by Portugal, a construction altogether opposed to the one accepted in England. A correspondence ensued between the two governments. in the course of which Mr. (now Sir Robert) Morier, then British Minister at Lisbon, forcibly urged upon his own government that mischief had arisen, and in future was likely to arise, from

DCCCXV.B. In the case of the *Halley*, the owners of a foreign ship sued for damage done to that ship by an English ship in Belgian waters. The owners of the English ship pleaded that the ship was in charge of a pilot, and that by the Belgian laws pilotage was compulsory there. The owner of the foreign ship replied that, by the Belgian laws, the pilotage, though compulsory, was not a defence to the claim for damage. This reply was objected to; but was admitted in the Court of Admiralty. On appeal, however, the Privy Council reversed this order, and rejected the reply (*k*). But the author still ventures to maintain that this point requires, and ought to receive, reconsideration (*kk*).

DCCCXVI. There seems, however, no reason why, if it should happen that the foreign law of the party to the collision agreed with the principles of the English statute,

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the establishment of these international rules without any international means of enforcing them. "The civilized governments of the world," he wrote, "with a view of diminishing the dangers of the sea, have called into existence International Sailing Rules without creating any international machinery to enforce them, and have thus left international obligations to be enforced by municipal sanctions." As a solution of the difficulty, Mr. Morier suggested the establishment by international agreement, in cases where two states adopting the Regulations differed thereon in a matter involving no criminal question, of a right of appeal to the supreme court of some third state being a party to the agreement. This third, or arbitrating, state, he proposed, should be one of the seven great powers, viz.: Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and the United States. By way of illustration he referred to what was called the "Austrägal" procedure that existed in the German Confederation subsequently to 1815, under which system the supreme court of any state comprised in the Confederation might be resorted to for final arbitration in disputes arising either between other states of the Confederation, or between private citizens whose rights were compromised by a conflict of the jurisdictions of such states.

Parliamentary Papers, 1882 (Commercial), No. 46, pp. 195–198.]

(*k*) *L. R.* 2 *Adm.* p. 3; *L. R.* 2 *P. C.* p. 193.

(*kk*) See *The China*, 7 *Wallace*, (*Sup. Ct. U.S.A.*) *Rep.* at p. 64 (A.D. 1868), [and *The Hibernian*, *L. R.* 4 *P. C.* p. 511.]

these principles should not be applied to the adjudication of this case.

The parties in such a case would have a common law binding on themselves, distinct from the general maritime law, and neither party could complain if they were holden amenable to their own law (*l*).

DCCCXVII. The [Admiralty Division] has, in what are called *causes of possession*, jurisdiction to take a ship from a wrongdoer, and deliver her over to a person claiming as the right owner. It will exercise this jurisdiction in a suit between foreigners in this country, with the consent of parties, or when the case has been referred to its decision by the application of the representative of the foreign state to which the parties belong, or [possibly] even with the [mere] consent [of such state.] At first, it did so with reluctance, because these questions had ceased to be dependent on the *jus gentium*, and had become dependent on the municipal regulations of foreign states, with which it was but imperfectly acquainted. Of late years, however, this jurisdiction seems to have been exercised without scruple (*m*).

DCCCXVIII. The fourteenth book of the Digest contains three very celebrated titles or chapters:—

i. *De Exercitoriâ actione.*
ii. *De Lege Rhodiâ de jactu.*
iii. *De Institoriâ actione.*

These are, in fact, the bases of the doctrine of *agency* in European commercial jurisprudence, especially in its effect upon *third* parties. The *dominus navis* is, properly, the owner of a ship. The *exercitor* is the charterer, hirer, or employer of a ship for a whole voyage. The *magister*

(*l*) Cf. *Westlake*, ss. 192-195 (edition of 1880).
(*m*) *The Martin of Norfolk*, 4 *C. Rob. Adm. Rep.* p. 293.
The Johan and Siegmund, Edwards, Rep. p. 242.
The See Reuter, 1 *Dodson's Rep.* p. 22.
[*The Agincourt, L. R.* 2 *P. D.* p. 239.
The Evangelistria, cited in a note to the above case, *ibid.* p. 241.]

navis (*n*) is the modern master or captain. European law follows the Roman law, in allowing the master to appoint, in case of need, a deputy; and the Roman law (*o*) held that the *utilitas navigantium* required that the owner should be bound by the act of substitution, though he had especially forbidden the master to appoint a deputy. The owner is said, *præponere*, to appoint the master, and the appointment is expressed by the word *præpositio* (*p*).

The *Institor* was the clerk or shopman of a person in trade: "Appellatus est ab eo quod negotio gerendo "*instat*," says the Digest (*q*).

The relation of the *Institor* to his principal did not hold out to third parties the same presumption of unlimited authority as agent, which the relation of *Magister* to his principal did hold out to them.

The *Institor* was at home, and reference could be easily made to his principal, *qui eum præposuit.*

DCCCXIX. The Roman law, moreover, held owners to be responsible *in solidum* (*r*) for the obligations of the master, whether they arose *ex contractu* or *ex delicto*. But by the general maritime law of Europe the liability of owners for the wrongful acts of masters is limited to the value of the vessel and freight, and by abandoning these to

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(*n*) *Dig.* lib. xiv. t. i. 1, § 1: "Magistrum navis accipere debemus cui totius navis cura mandata est." *Ibid.* § 5: "Magistrum autem accipimus non solum quem exercitor præposuit, sed et eum quem magister."

(*o*) That is, the *Prætorian* law; for the old strict Roman law did not, generally speaking, allow an action against the principal to grow out of an act of an agent.

(*p*) "Igitur *præpositio* certam legem dat contrahentibus." *Dig.* lib. xiv. t. i. 1, § 12.

(*q*) *Dig.* lib. xiv. t. iii. 3. *Instit.* lib. iv. t. vii. 2.

(*r*) *Dig.* lib. xiv. t. i. 1, §§ 20–25: "Si plures navem exerceant, cum quolibet eorum in solidum agi potest." *Ibid.* § 25.

And *Dig.* lib. iv. t. ix. on the edict: "Nautæ, Caupones, Stabularii, ut recepta restituant," where it is said, "nautam accipere debemus eum qui navem *exercet*."

the creditor the owners may discharge themselves (*s*). This limitation, however, did not form part of the *common law* of England, or of the United States, but was introduced into them by special statute.

Now, in England the value of the ship is arbitrarily fixed at 8*l.* per ton in ordinary cases, and 15*l.* per ton in cases where the wrongful act has given rise to claims for loss of life or personal injury. And this law has been holden to apply where the owners of a foreign ship sue an English ship in the Admiralty Court for damage from a collision on the high seas (*t*).

DCCCXX. "Omnia enim facta magistri debet præstare, "qui eum præposuit; alio quin contrahentes decipi-"entur . . ." (*u*), is the language of the Digest in the famous title, "De exercitoriâ actione," which is full of that written equity which so often renders the Roman law the fountain of international jurisprudence.

This maxim is stated in the Roman law without limitation or distinction as to the place in which the authority of the master is exercised. But the exigencies of modern commerce have introduced a wise and just distinction between the exercise of such authority in a home, and its exercise in a foreign, port. The principle on which the distinction rests is, that in a home port the authority of the owner is easily accessible, while in a port abroad the necessities of the ship

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(*s*) *Emérigon, Traité des Contrats à la grosse Aventure*, c. iv. s. xi.
Boulay Patey, Cours de Droit Comm. tome i. pp. 263–298.
Kent, Comm. vol. iii. p. 218.
The Rebecca, Ware, (District Court of Maine) Rep. p. 188.
Malpico v. *McKown*, 1 *Louisiana Rep.* p. 259.
Arayo v. *Currell, ibid.* p. 528.
[French *Code de Commerce*, art. 216.
Italian *Codice di Commercio*, art. 491.
Dutch *Wetboek van Koophandel*, art. 321.]

(*t*) *The Amalia, Browning & Lush. Adm. Rep.* p. 151; s. c. 1 *Moore, P. C.* (*N. S.*) p. 471 (1863). See remarks on this case in *Wendt's Papers on Maritime Legislation* (2nd ed.), p. 23, [(3rd ed.) p. 513.]

(*u*) *Dig.* lib. xiv. t. i. 1, § 5.

may require instant succour, and, as Mr. Bell observes, "this is the great principle of distinction between the *actio* "*exercitoria* and the *actio institoria* of the Roman law" (*x*).

DCCCXXI. The authority of the master of a ship, as agent of the owner in a foreign port, has, however, given rise to a difficult international question on the law of contract (*y*).

By the English law the master of a ship may, in a foreign port and in certain circumstances, borrow money for the *necessities* of his ship, and may give a security called a Bottomry bond, which will render the ship and freight, and sometimes the cargo (*z*), liable for repayment of the loan.

But according to the English law the validity of this bond depends, first, upon the money being borrowed, not for merely useful, but for absolutely necessary, supplies; secondly, upon the bond having been taken where the owner was known to have no credit, to be in a state of unprovided necessity. If the master takes up money from a person who knows that he has a general credit in the place, or an empowered consignee, or agent, willing to supply his wants, then the giving a bottomry bond is a void transaction (*a*).

Moreover, the English decisions hold (*b*) that the

(*x*) *Story on Agency*, ss. 33, 36. *Bell, Comment.* (7th edit.), bk. iii. pt. i. ch. iv. subs. v. (Vol. I. p. 571).

(*y*) *Story, Conflict of Laws*, s. 286 *b*.

Story on Agency, s. 36.

"The contract with the master, in all questions between him and the owners, is properly *locatio conductio operarum*; in relation to strangers it is the contract of *agency*."—*Bell's Comment.* (ed. *Shaw*, 1858), vol. i. pp. 381, 382.

(*z*) *The Gratitudine*, 3 *C. Rob. Adm. Rep.* p. 240.

(*a*) *The Nelson*, 1 *Haggard, Adm. Rep.* p. 169.

[See as to pledging owner's credit for necessaries *Arthur* v. *Barton*, 6 *Mees. & Wel. Rep.* p. 138. *Gunn* v. *Roberts*, *L. R.* 9 *C. P.* p. 331.]

(*b*) At least, as Story (*Conflict of Laws*, s. 286 *b*) correctly remarks, "such seems the course of the adjudications." Though perhaps this

master's authority to bind the ship or the owner in a *foreign* port is governed by the law of the domicil of the owner, and not by the law of the place in which the bond is given. So that a foreigner, who in his own country made a valid contract for supplying mere useful repairs to the master of an English ship, would find the bond given by the master worthless when it was attempted to enforce it in the country of the master.

In the United States there is a conflict of decisions upon this subject. The Courts of Louisiana have twice pronounced in very elaborate judgments that the law of the place of the contract, and not the law of the owner's domicil, furnishes the rule by which his obligations in this matter are governed (c).

"Where a general power is confided to an agent, the "party contracting with him is not bound by any limitation "which the principal may have affixed, at the time or since, "by distinct instructions. Now, in the case before us, if "instructions be supposed to have been given to the master, "not to bind the owner beyond the value of the vessel and "freight, or for any act which the latter could not prevent, "would parties contracting with the former, in a foreign "country, be bound by them? We think it is certain they "would not. *Every contract, which by the general maritime "law the master can make, is binding upon the owner.* By "putting the former in command, and sending him abroad, "the latter invests him with the general powers which "masters have as such, and those who contract with him "have nothing to do with any private instruction, by which "the general power may have been limited. If the limi-

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question of conflict between two laws, in the matter of the master's authority, has never been satisfactorily argued. [See now *Lloyd* v. *Guibert*, *L. R.* 1 *Q. B.* p. 115; *The Gaetano e Maria*, *L. R.* 7 *P. D.* pp. 1, and 137.]

(c) *Malpica* v. *McKown*, 1 *Louisiana Rep.* p. 248.
Arayo v. *Currell*, *ibid.* p. 528.
Story, s. 286 c. and note.

" tation arises not from the owner's instructions, but from " the particular laws of the country from which the vessel " has sailed, must not the consequence be the same? Can " these laws limit the master's power more effectually than " the owner could, or can they extend farther? We think " not. They have no force in a foreign country, where " they are presumed to be equally unknown " (*d*).

In a more recent case a different law was laid down in the Circuit Court of the United States. The case was this :—A vessel, owned in Massachusetts, being on a voyage from a port in Spain to a port in Pennsylvania, was compelled by stress of weather to put into Bermuda, where the master sold the vessel and the whole cargo. The shippers brought an action against the owners to recover the amount of their consignment. This put in issue the right of the master to sell the whole cargo and bind the owners by his act. The court determined that the liability of the owners was governed by the law of Massachusetts, their domicil, and not by the law of Spain, where the contract of shipment was made, nor by the law of Pennsylvania, where the goods were to be delivered (*e*).

The Scotch lawyers agree with this exposition of the law by the Circuit Court, and by the English tribunals. Mr. Brodie enters into the question at length, and concludes, " The clear result is, that the transactions must " be held to have reference to the master's implied man- " date, according to the law of his own country—a man- " date which it is the duty of those who deal with him as " an agent to ascertain the extent of " (*f*).

The Court of Louisiana, however, argues, " What we " do by another we do by ourselves; and we are unable

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(*d*) *Arayo* v. *Currell*, *ubi sup.* at p. 536. Judgment by Mr. Justice Martin; see *Story*, *Conflict of Laws* (5th American edit. pp. 445 3), note to s. 286 *c*.

(*e*) *Pope* v. *Nickerson*, 3 *Story's Rep.* p. 465.

Story, s. 286 *cc*.

(*f*) *Stair's Institutes* (4th edit. by G. Brodie), vol. ii. p. 956.

" to distinguish between the responsibility created by the " owner, sending his agent to contract in another country, " and that produced by going there and contracting him- " self " (*g*).

And again, " If there be a principle better established " than any other, on the subject of the conflict of laws, it " is, that contracts are governed by the laws of the country " in which they are entered into, unless they be so with a " view to a performance in another. Every writer on that " subject recognizes it. Judicial decisions again and " again, through the civilized world, have sanctioned it. " Why, then, should this case form an exception ? " (*h*)

DCCCXXII. It will not have escaped the reader of the former pages on the subject of Obligations, that the English Courts, and the Circuit Court of the United States, adopt in this instance the principle of continental and civil law—viz. that the law of the domicil regulates the *capacity* to contract—and depart, under the supposed pressure of mercantile expediency, from their doctrine that this capacity is governed by the law of the place of contract.

DCCCXXIII. It certainly appears to the writer of these pages that the general principles of International Law support the decisions of the Louisiana Courts rather than the judgment of the Circuit Court of the United States. The Law of Nations requires good faith as much in commerce as in war. The money *bonâ fide* advanced for the necessities of a foreign ship in a foreign port to a person like the captain, *presumably* authorized to bind his employers, ought to be repaid by them in every case; unless, indeed, the lender was affected with the knowledge of the limited powers of the captain. In that case the

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(*g*) *Story*, s. 286 c.
Wharton, Conflict of Laws, s. 441. [1st ed. and 2nd ed. rather differ.]
Malpica v. *McKown*, 1 *Louisiana Rep.* at p. 254.
(*h*) *Arayo* v. *Currell*, 1 *Louisiana Rep.* at p. 533.
Story, s. 286 c.

terms of the owner's authority to the captain may govern the contract, or, as the Digest says, "*præpositio* certam "legem dat contrahentibus;" or, perhaps, unless the lender was grossly wanting in the ordinary *diligentia*, in inquiry into the powers of the person with whom he is contracting, which is required by the law from all persons. This opinion derives strength from the following language of Emérigon.

DCCCXXIV. The opinion of Emérigon upon the power of the master to bind the owners by his contract must have great weight in all questions of comity relating to this subject:—

"Si la faculté," says this high authority (*i*), "de "prendre des deniers à la grosse pendant le cours du "voyage, avait été expressément prohibée au capitaine, "ceux qui lui ont fourni de l'argent auront-ils action "contre les armateurs?

"Il semble d'abord que dans ce cas toute action "devrait être déniée aux prêteurs contre les propriétaires, "au bénéfice de qui l'argent n'a pas été employé: *qui cum* "*alio contrahit, vel est, vel debet esse, non ignarus conditionis* "*ejus.* (*Loi* 19 *ff. de reg. jur.*) Divers textes paraissent se "réunir pour établir ce sentiment.

"*Loi* 7 *ff. de exercit. act. Ut sciat in hoc se credere, cui* "*rei magister quis sit præpositus.*

"*Loi* 1, § 7, *ff. eod. Non autem ex omni causâ prætor* "*dat in exercitorem actionem, sed ejus rei nomine cujus ibi* "*præpositus fuerit.*

"*D. lege*, § 12. *Præpositio certam legem dat contrahen-* "*tibus. . . . Modum egressus non obligabit exercitorem.*

"*Si sic præposuit, ne alter sine altero quid gerat, qui* "*contraxit cum uno, sibi imputabit.—D. leg.* i. §. 14.

"Tout cela est vrai, si le préteur était instruit des "défenses faites au capitaine; mais s'il ignorait les

(*i*) *Emérigon*, Tome ii. *Traité des Contrats à la grosse Aventure*, chap. iv. s. viii. §§ 3, 4. [The citations are from *Dig.* lib. xiv. tit. i.]

" défenses, l'action sera ouverte contre les propriétaires, " attendu la foi publique. Tout capitaine est présumé " *maître*, et jouir du libre exercice des pouvoirs que cette " qualité lui défère. Ceux qui contractent avec lui en " pays étranger ne sont pas obligés de lui faire exhiber " ses titres, et il peut aisément les leur cacher. Le " § 5 de la Loi ci-dessus citée, après avoir décidé que " le contrat passé avec celui que le capitaine a subrogé en " sa place, est obligatoire vis-à-vis des propriétaires, ajoute " qu'il en serait de même, quoiqu'ils eussent nommé- " ment prohibé à leur capitaine d'en subroger un autre. " *Dicendum erit eò usque producendam utilitatem navigan-* " *tium.*

" Je conviens qu'il y a une grande différence entre " celui qui s'embarque dans un navire, ou qui y charge " des marchandises, et celui qui prête de l'argent au " capitaine. Mais le motif de la loi, fondé sur l'erreur " commune, doit être admis dans tous les cas.

" Je crois donc que, malgré la prohibition faite au " capitaine de prendre des deniers à la grosse en cours de " voyage, ceux qui de bonne foi auront donné leur argent " à ce capitaine infidèle, n'auront pas moins action contre " les propriétaires, et privilége sur le navire. Il faudrait " que la prohibition leur eût été auparavant intimée, ou " que du moins elle eût été rendue publique dans le lieu du " contrat (*k*).

" Duarenus, *ff. de exercit. act. pag.* 1297, expliquant la " loi *Lucius Titius* (*kk*), dit qu'il suffit que celui, qui prête

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(*k*) [Emérigon cites—]
Lois 11 *et* 17, *ff. De inst. act.* *Stypmannus*, pt. iv. c. xv. num. 135, p. 543.
Loccenius, lib. iii. tit. vii. num. 9, p. 1033.
Peckius et Vinnius, pp. 88, 103, 111.
Roccus, de Navib. not. 12.
Casaregis, disc. 71, num. 8.
Pothier, Obligations, n. 79, tom. i. p. 39 [partie i. chap. i. s. 79.]
[(*kk*) *Dig.* lib. xiv. t. i. 7.]

" de l'argent au capitaine infidèle, se soit comporté *avec* " *quelque diligence*, de manière à n'être soupçonné coupable " d'aucune fraude : *Satis est eum adhibere aliquam dili-* " *gentiam, ut non appareat eum malo animo mutuam* " *pecuniam dedisse.* D'où il suit, que si la négligence est " extrême, et qu'il y ait faute grave, on peut, suivant les " circonstances, lui refuser toute action contre les arma- " teurs : *Gravis culpa dolo æquiparatur.*

" M. Valin, art. 19, titre *du Capitaine*, rappelle la dis- " position de la même loi *Lucius Titius.* ' Mais tout cela,' " dit-il, ' comme trop subtil et trop pointilleux, a été " ' rejeté dans l'usage du commerce, et il suffit, pour " ' autoriser le créancier prêteur à agir contre le pro- " ' priétaire du navire, qu'il ait prêté la somme de bonne " ' foi au capitaine, c'est-à-dire qu'il n'y ait ni preuve, ni " ' *présomption suffisante de collusion entre le capitaine et* " ' *lui.*'

" Cet auteur n'exclut pas les présomptions suffisantes " de collusion, lesquelles dépendent des circonstances du " fait, qui varient à l'infini. Celui qui veut s'embarquer " ou charger des marchandises, n'a pas souvent le choix " du vaisseau. Il est forcé, *propter navigandi necessitatem*, " de se servir du premier navire qui se présente. Mais, " celui qui prête son argent à un capitaine, le fait " volontairement et sans y être contraint ; le motif de " l'édit du préteur cesse à son égard. Il est donc juste " qu'il y apporte la prudence commune : *Aliquam diligen-* " *tiam* " (*l*).

Emérigon then speaks of the manner in which the celebrated *Ordonnance* (*ll*) had curtailed the powers of the captain :

(*l*) " *Cujas, Vinnius, Faber* et autres Docteurs, sur ladite Loi *Lucius Titius*, 7, *ff. de exercit. act.* ; *Stypmannus*, pt. iv. c. vi. num. 124 ; c. xv. num. 154, pp. 418, 544 ; *Pothier, Obligations* [partie ii. chap. vi. s. 448, are then cited.]

[(*ll*) *Ordonnance de la Marine*, promulgated by Louis XIV. A.D.

" Mais notre Ordonnance a réduit le pouvoir du " capitaine, en cours de voyage, ou *à prendre deniers sur le* " *corps*, ou *à mettre des apparaux en gage*, ou *à vendre des* " *marchandises de son chargement* pour les nécessités du " navire. S'il tire des lettres de change sur ses armateurs, " cet engagement, quoique conçu en nom qualifié, lui " devient personnel, attendu qu'il a excédé son mandat " légal. Il ne doit contracter aucune obligation qui ne " soit inhérente au navire même, et qui ne dépende du " succès de l'expédition maritime. C'est à quoi se borne " l'autorité que sa qualité de *maître* lui défère (à moins " que son raccord, ou le droit commun, en certains cas, " ne lui donnent un pouvoir plus étendu) " (*m*).

DCCCXXV. " The general principle," Dr. Lushington says, " sanctioned by maritime law is, that the master has " not, as master, any authority to sell; that necessity only " will justify such a sale, and render the transfer valid. " The question then is, as to the existence of an adequate " necessity. This necessity is to be judged of by all the " circumstances. I will mention some of them: (1) The " state and condition of the vessel; (2) consequences of " not proceeding to sell; (3) facility of communication " with the owner; (4) the resources of the master, or the " total absence of all resources; (5) in some degree, too, " the power and means of the owner to avert a sale. I " conceive that the law inclines against sales of this de- " scription, and throws the burden of strict proof upon the " purchaser, for it is his duty to ascertain the authority " under which the master acts, or the circumstances which " render a sale imperatively necessary; and from this " proof, save where there has been a decree by a com- " petent court, no formality can release him " (*n*).

1681. See sect. xvi. arts. 17–20. A large part of the *Ordonnance* is now embodied in the French *Code de Commerce*, livre deuxième.]

(*m*) *Emérigon*, *ubi sup.* c. iv. s. xi. § 5.

(*n*) *The Glasgow*, otherwise *Ya Macraw*; (a case in which the sale

DCCCXXVI. According to the English law, the authority of the master of a ship to pledge by bottomry for the purpose of raising money for the absolute necessities of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner; and such power to raise money by bottomry is vested in the master, although the owner resides in the same country, provided there is no means of communication with the owner, and the exigency of the case requires it (*nn*).

In a case, decided by the English Privy Council, a bottomry bond was granted in New York by the master of a ship, to obtain money for necessary repairs; the owner of the ship was residing at St. John's, New Brunswick. A communication by electric telegraph existed between the two cities. The bondholder had previously acted as the general agent of the owner, and no intimation of the transaction was made by the master to the owner until after the execution of the bond.

It was holden upon appeal (reversing the sentence of the Admiralty Court) that, the master having the means of communication with the owner, no such absolute necessity existed as to authorize him to pledge the ship without communication with the owner, and the bond was declared void (*o*).

DCCCXXVII. The following case of the *Milford* pre-

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of an English vessel by the master at Savannah was sustained).—*Swabey, Adm. Rep.* p. 145.

In the cases of the *Bonita* and the *Charlotte* (1860), the sales were set aside.—*Lush. Adm. Rep.* p. 252.

[(*nn*) As to Law governing the right of a master to hypothecate, see *Cargo ex Hamburg, Br. & Lush.* p. 253, and *Messina* v. *Petrocochino, L. R.* 4 *P. C. C.* p. 144. *The Gaetano e Maria, L. R.* 7 *P. D.* pp. 1 and 137.]

(*o*) *The Oriental*, [or *Wallace* v. *Fielden*] (1851), 7 *Moore, P. C. Rep.* p. 398.

See also *The Buonaparte*, 8 *Moore, P. C. Rep.* p. 459.

sents a remarkable, and perhaps questionable, application of the statute law (*p*) of England to an American ship:—

A subject of the United States shipped at San Francisco, as second mate, on board an American ship on a voyage to the United Kingdom. During the voyage he became master. On his arrival in this country he proceeded against the freight for his wages as master. An appearance was given for the owners, under protest, that by the American law the master had no lien on the freight for wages. It was holden that this was a question of remedy, and must be governed by the *lex fori*, and that, as there was nothing to show any special contract, the master was entitled to all the remedies which the law of this country affords in a case of wages. The protest was overruled, with costs (*q*).

DCCCXXVIII. When the preservation of the ship has required the throwing overboard or sacrifice of a portion of the goods, equity demands that a general contribution be made by all towards a loss sustained by some for the benefit of all; and this is called in England by the name of *General Average* (*r*).

(*p*) See express provision in the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 290), as to a conflict of laws in certain cases.

[*Conflict of Laws.*—Sec. 290. "If in any matter relating to any ship, or to any person belonging to any ship, there appears to be a conflict of laws, then, if there is in the third part of this act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provision; and if there is no such provision the case shall be governed by the law of the place in which such ship is registered."]

(*q*) *The Milford* (1858), *Swabey, Adm. Rep.* p. 362.

(*r*) According to the English Law, "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, come within *general average*, and must be borne proportionably by all who are interested."—*Birkley* v. *Presgrave*, 1 *East*, *Rep.* p. 220.

It has been decided by the English Courts, that a claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship and the rest of the cargo from an impending danger, not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of

The law on this subject was transplanted from the maritime code of Rhodes into the Roman Law, as follows:—"Lege Rhodiâ cavetur ut, si levandæ navis gratiâ jactus "mercium factus sit, omnium contributione sarciatur, quod "pro omnibus datum est" (*s*).

The principle of this rule has been adopted by all commercial nations, but with considerable variation in practice as to the kind of losses which demand its application, and as to the nature of the interests compellable to contribute. The question, therefore, may arise, and has arisen, what Law ought to bind the underwriters to reimburse a contribution exacted in a foreign port (*t*). The English cases have established the following two propositions:—

(1.) With respect to what Law shall govern the construction of the insurance covenant as to what is general average. In former editions of this work it was stated that it had been decided, after much doubt and consideration, that the insurer of goods to a foreign state is not liable to indemnify the assured, though a subject of that state, who has been obliged by a decree of a competent court of that state to pay a contribution as for general average, which by the law of England is not general average, unless it be proved as a fact in the case that the assured and insurer contemplated in their contract the general usage amongst merchants, or the usage of the port in which the general average was struck (*u*). The United States cases are in accordance with this doctrine (*x*).

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damage incurred by ordinary perils of the sea.—*Hallett* v. *Wigram* (1850), 9 *Manning & Scott, Common Bench Rep.* p. 580.

(*s*) *Dig.* lib. xiv. t. ii. 1.

(*t*) This point seems to have escaped the attention of Story in his *Conflict of Laws.*

(*u*) *Park on Insurance*, chap. xxii. p. 900.

Power v. *Whitmore* (leading case on this point), 1815, 4 *Maule & Sel. Rep.* p. 149 [discussed in *Atwood* v. *Sellar*, *L. R.* 5 *Q. B. D.* p. 286.]

Newman v. *Cazalet*, *Park*, *ubi sup.* [*Greer* v. *Poole*, *L. R.* 5 *Q. B. D.* p. 272.]

(*x*) *Schmidt* v. *United Ins. Co.* 1 *Johnson* (*Sup. Ct. of New York*) *Rep.* p. 249. [See *Arnould on Marine Insurance*, pt. iii. ch. iv.]

This principle, however, seems to have been reversed in the important case of *Dent* v. *Smith* (*y*), which has been since more than once approved of by the English courts.

In that case the plaintiffs effected a policy of insurance in London with the defendants, on "five boxes of bar-gold, "in the ship called the *Dutchman*, at and from London to "Constantinople, including all risks from the Bank of "England until safely delivered to the consignees at Con-"stantinople." [At the time of the insurance the ship was English, but next day she was transferred to Russian owners and became a Russian ship.] The perils insured against were the usual perils, including those of the seas, with the usual suing and labouring clause. The ship sailed with the gold and other cargo on board, and was stranded in Turkish territory, about 100 miles from Constantinople, and within the jurisdiction of that port. The gold was immediately landed by the captain, and deposited with the Russian consul; and the consignees were compelled, in order to obtain it, to make a deposit of 20 per cent. upon the gold, as security for the payment of any sum that might be awarded against them, as average or salvage expenses, by the Russian consular court. In Turkish territory, by capitulations with the Great Powers, all matters touching ships and their cargoes are decided by the consular court of the country to which the ship belongs. After the gold had been landed, operations were commenced to get the vessel off, which proved ineffectual. But most of the cargo was saved, and many parts of the fittings of the ship. According to the practice, the Russian consul appointed a curator of the wreck; and three persons were appointed by the Russian consul to decide upon the average to be paid by all

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Lenox v. *United Ins. Co.* 3 *Johnson's Cases*, p. 178.

Shiff v. *Louisiana State Ins. Co.* 6 *Martin*, (*Louisiana*) *Rep. N. S.* p. 629.

(*y*) *L. R.* 4 *Q. B.* p. 414. [Cf. *Harris* v. *Scaramanga*, *L. R.* 7 *C. P.* p. 481. *Messina* v. *Petrococchino*, *L. R.* 4 *P. C. C.* p. 144.]

parties concerned. They found it not a case of average, but a case of salvage; and they awarded that the cargo, including the gold, must contribute to the expenses in certain proportions, according to the value, and this threw by far the greater part of the expenses on the gold. The agents of the plaintiffs and defendants protested against the award, as the gold had been landed before any of the operations had been commenced; but the award was ratified by the Russian Minister at Constantinople, and no notice of appeal to the court at St. Petersburg having been lodged within eight days, it became a definitive judgment binding on all parties. [Had the ship remained English, the expenses would have been adjusted according to English Law, and less would have been charged against the gold.]

The plaintiffs, having been thus obliged to pay the sum awarded against the gold, brought an action to recover a proportionate part of it from the defendants, as a partial loss by the perils insured against.

It was holden that it was unnecessary to go into the question of whether or not the judgment of the Russian consular court was strictly according to the law administered in that court; the ship having been wrecked, the consequence was that the gold had got into the hands of the Russian authorities, and in order to get it back, the plaintiffs had been compelled to pay the sum claimed, and this was the immediate consequence of the wreck, and the plaintiffs were therefore entitled to recover the money as a loss by perils of the sea. It was further holden that the plaintiffs had done all that a reasonable uninsured owner would have done, and were not bound to have appealed to the court at St. Petersburg.

(2.) In cases of admitted general average, England, in conformity with the maritime laws and usages of all nations (*z*), holds that the place of the ship's destination,

(*z*) [*Arnould on Marine Insurance*, pt. iii. ch. iv. vol. ii. p. 910 (ed. 1887).]

or delivery of her cargo, is the place at which the average is to be adjusted.

This adjustment must be made conformably to the Law of that place.

When so made it will be conclusive as to the items, as well as to the apportionment thereof upon the various interests, although it may be different from what the English Law would have made, if the adjustment had been settled in an English port (*a*).

DCCCXXVIII.A. [The attempts which have been made to obtain the consent of all maritime nations to one system of rules regulating General Average, the formation of the York-Antwerp rules, and their very general adoption will be found fully set forth in the pages of Dr. Wendt's work (*aa*).]

DCCCXXIX. The general Law of the United States upon the subject of the power of the master is clearly stated in the two following extracts from the judgments of their Supreme Court:

"It is true," it is said in one of these judgments, "the "master of a steamboat, like other agents, has not an un- "limited authority. He is the agent of the owner, to do "only what is usually done in the particular employment "in which he is engaged. Such is the general result of the "authorities (*b*). But different employments may, and do,

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(*a*) *Simonds* v. *White*, 2 *Barn. & Cres. Rep.* p. 805. [Cf. *Lloyd* v. *Guibert*, *L. R.* 1 *Q. B.* p. 115.]

Dalglish v. *Davidson* (1824), 5 *Dowling & R. Rep.* p. 6.

Tudor's Leading Cases on Maritime and Mercantile Law. Notes on *Birkley* v. *Presgrave*, 1 *East, Rep.* p. 220.

See *The Copenhagen*, 1 C. *Rob. Adm. Rep.* at p. 293.

Journal du Droit Intern. Pr. vol. i. p. 133, German decision, 1872: Le port de destination, ou autrement dit, celui où le voyage s'achève, est le port du règlement des avaries.

[*Maude & Pollock, Law of Merchant Shipping*, vol. ii. chap. vi. part ii. (p. 436 in 4th edit.)]

[(*aa*) *Papers on Maritime Legislation* (3rd ed.), pp. 1-294.]

(*b*) See *Smith's Mercantile Law*, book i. ch. iv. section 4.

Grant v. *Norway*, 10 *Com. Bench Rep.* pp. 686-689.

Pope v. *Nickerson*, 3 *Story's Rep.* p. 475.

Citizens' Bank v. *Nantucket Steamboat Co.* 2 *Ibid.* p. 16.

"have different usages, and, consequently, confer on the "master different powers. And when, as in this case, a "usage appears to be general, not unreasonable in itself, "and indirectly beneficial to the owner, we are of opinion "that the master has power to act under it, and bind the "owner" (c).

In the other case the judges of the Supreme Court say—

"Upon the first question, we have no doubt that there "may be cases in which the contract of the captain in re- "lation to the amount of salvage to be paid to the salvors, "or his agreement to refer the question to arbitrators, "would bind the owners. In times of disaster it is always "his duty to exercise his best judgment, and to use his "best exertions for the benefit of the owners of both vessel "and cargo; and when, from his situation, he is unable to "consult them or their agent, without an inconvenient "and injurious delay, it is in his power to compromise a "question of salvage; and he is not bound in all cases to "wait for the decision of a Court of Admiralty. So, too, "when the salvage service has not been important, and the "compensation demanded is a small one, it may often be the "interest of the owners that the amount should be settled "at once by the captain, and the vessel proceed on her "voyage, without waiting even a day for the purpose of "consulting them. But in all such cases, unless the acts "of the captain are ratified by the owners, his conduct will "be carefully watched and scrutinized by the court, and his "contracts will not be regarded as binding upon the parties "concerned, unless they appear to have been *bonâ fide*, and "such as a discreet owner, placed in the like circumstances, "would probably have made. If he settles the amount by "agreement, those who claim under it must show that the "salvage allowed was reasonable and just. If he refers it "to arbitrators, those who claim the benefit of the award

(c) *The Steamboat New World* v. *King*, [16 *Howard*, (*Sup. Ct. U.S.A.*) *Rep.* at pp. 473-474; and] 21 *Curteis*, *Rep.* p. 260.

"must show that the proceedings were fair, and the referees "worthy of the trust" (*d*).

DCCCXXX. We have now to consider the right known to English lawyers as the right of *Stoppage in transitu*, in its application to cases in which foreigners are concerned. According to the Roman Law, a contract of sale worked a *jus ad rem*, but did not, by the mere effect of consent, as in England (*e*), work a *jus in re*, a transference of the property (*dominium*) in the thing sold: "qui nondum rem emptori "tradidit adhuc ipse dominus est." And again, "tra- "ditionibus . . . dominia rerum, non nudis pactis, trans- "feruntur" (*f*). It was a necessary result of this maxim that either party might withhold performance of his obligation on the other becoming unable to perform his part.

The Law of continental Europe adopted, pretty generally, the rule that a seller was entitled, in all cases, and even after actual delivery, to have restitution of his goods, if unchanged in form, and capable of being distinguished from the stock of the buyer. The Scotch Law allowed restitution to the seller, on the ground of presumptive fraud, within three days of the bankruptcy of the buyer. This right of the seller, according to continental Law, was called the right of *Revendication* (*ff*).

(*d*) *Houseman* v. *The Schooner North Carolina*, 15 *Peters* (*Sup. Ct. U.S.A.*) *Rep.* at p. 45.

(*e*) Subject to a lien, while undelivered, for the price.

(*f*) *Instit.* lib. iii. t. xxiii. (or xxiv.) 3. *Cod.* lib. ii. t. iii. 20.

(*ff*) *Portula*, *Dizionario di Diritto e di Economia*, tit. Revendicazione.

Savigny (*R. R.* viii. s. 374 D) speaks of the right of the seller to resile from the agreement or retract, ("*das Recht des Rücktritts bis zur vollzogenen Uebergabe*") before complete delivery, as contrary to the *Common Law*; but, according to many local laws, in the case of immoveables, the right depends on the *lex rei sitæ*.

Thöl, *Handelsrecht*, vol. i. p. 288, § 69.

Bassevi, *Annotazione al Codice Civile Austriaco*, §§ 366-375.

Merlin, *Rép.* Revendication, I.

Code Civil, arts. 1612, 1613. *Rogron*, *ad loc.* (p. 723, edit. 1828).

Blume, *Deutsches Privatrecht*, p. 136, s. 174.

DCCCXXXI. A right closely analogous to that of *revendication* was introduced, by the reason of the thing and the exigencies of commerce, into England at the end of the seventeenth century, and into Scotland at the end of the eighteenth century; it was called, and is now universally known as, the right of Stoppage *in transitu* (*g*). It has been adopted by France in her *Code de Commerce* in the place of the old *Revendication* (*h*).

"The law" (Lord Wensleydale observed, in a leading case on this subject) "is clearly settled, that the unpaid "vendor has a right to retake the goods before they have "arrived at the destination originally contemplated by the "purchaser, unless in the meantime they have come to the "actual or constructive possession of the vendee. If the "vendee take them out of the possession of the carrier into "his own before their arrival, with or without the consent "of the carrier, there seems to be no doubt that the transit "would be at an end; though, in the case of the absence of "the carrier's consent, it may be a wrong to him, for which "he would have a right of action. This is a case of *actual* "possession, which certainly did not occur in the present "instance. A case of *constructive* possession is, where the "carrier enters expressly, or by implication, into a new "agreement, distinct from the original contract for carriage, "to hold the goods for the consignee as his agent; not for "the purpose of expediting them to the place of original "destination, pursuant to that contract, but in a new

(*g*) *Burge, Comm.* vol. iii. pp. 532 *et seq.*, p. 770.
Story, ss. 401, 402.
Bell's Comm. book ii. part iii. chap. ii. sect. ii. (edit. 1870).

(*h*) The *Code de Commerce*, liv. iii. t. i. chap. x. "De la revendication," contains, among other provisions, the following:—

Art. 576. ["Pourront être revendiquées les marchandises expédiées au failli, tant que la tradition n'en aura point été effectuée dans ses magasins, ou dans ceux du commissionnaire chargé de les vendre pour le compte du failli."

The Italian Commercial Code (Art. 802-808) contains similar provisions.]

"character, for the purpose of custody on his account, and "subject to some new or further order to be given to "him" (*i*).

DCCCXXXII. The Right of stoppage *in transitu* is, Lord Stowell (*k*) observed, not only "the doctrine of the "Law of England," but "the general expression of the "mercantile Law on the subject." The consignor has what Lord Mansfield called "a proprietary lien" upon goods *in transitu* for which payment has not been received. This doctrine was transplanted from the *lex mercatoria* into the Common Law of England. Great doubt and dispute have prevailed, and, perhaps, still do prevail, as to whether this right of stoppage amounts to a rescinding of the contract, or to a mere extension of the doctrine of the seller's lien upon the thing sold (*kk*).

DCCCXXXIII. It may be well to state that the English decisions appear to have established the following propositions as incident to this right:

a. The right of stoppage *in transitu* can only be exercised by a vendor, or person standing in the position of a vendor, of goods (*l*).

β. The right is limited to cases in which the *bankruptcy* or *insolvency* of the vendee has taken place. A partial payment by the vendee does not [defeat] the right (*m*).

(*i*) *Whitehead* v. *Anderson*, *Tudor's Leading Cases on Mercantile and Maritime Law* (3rd edit.), p. 425; s.c. 9 *Meeson & Welsby*, *Rep.* p. 518.

(*k*) *The Constantia*, 6 *C. Rob. Adm. Rep.* pp. 325–6. Lord Stowell referred to *Emérigon*, *Assurances*, tome i. pp. 323, 324, chap. xi. sect. iii., as showing that the *Vendeur primitif* might protect himself against non-payment by seizure of the goods, but this is perhaps not so much a right of stoppage *in transitu* as the right of *revendication*.

[(*kk*) See *Smith*, *Merc. Law*, book iv. ch. i., and *Smith's Leading Ca.* vol. i., Notes to *Lickbarrow* v. *Mason*.]

(*l*) *Tudor's Leading Cases on Maritime and Mercantile Law* (3rd edit.), p. 429.

(*m*) *Ib.* pp. 432, 433.

γ. As a general rule the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee; during this period, the vendor's right of stoppage [continues] (*n*).

δ. Notice on the part of the vendor by himself or agent to the carrier not to deliver the goods, suffices to cause the [vendor's lien upon them for the unpaid purchase money] to attach (*o*).

ε. The better opinion seems to be that the effect of the exercise of the right is merely to replace the vendor in the same position, as if he had not parted with the possession of the goods, and not to rescind the contract; but the point cannot be said to have been decided (*p*).

ζ. The right of stoppage may be defeated [where the vendee, being with the vendor's assent in possession of a bill of lading representing the goods, transfers such bill to a third person *bonâ fide*] (*q*).

DCCCXXXIV. What Law is to decide as to whether this right of stoppage exists or not? The *lex loci contractûs*, Mr. Burge says (*r*), relying on Casaregis (*s*), and on decisions in the English (*t*) and United States Courts (*u*). It is a lien, Story (*x*) says, which "having "once attached rightfully *in rem*, ought not to be dis- "placed by the mere change of local situation of the "property."

(*n*) *Tudor's Leading Cases on Maritime and Mercantile Law* (3rd edit.), p. 434.

(*o*) *Ib.* p. 450.

(*p*) *Ib.* p. 454.

(*q*) *Ib.* p. 455.

(*r*) *Burge, Comm.* vol. iii. pt. ii. chap. xx. p. 770.

(*s*) *De Commercio, Disc.* 179, num. 47–55.

(*t*) *Inglis* v. *Usherwood*, 1 *East, Rep.* p. 513. In this case the right of stoppage *in transitu* was holden to be governed by Russian, materially different from English, Law, and it was enforced against English creditors; but the circumstances were peculiar, the lien was Russian, and enforced in Russia.

(*u*) *Whiston* v. *Stodder*, 8 *Martin*, (*Louisiana*) *Rep.* pp. 133–135.

(*x*) S. 402; see, too, *Bell's Comm. ubi sup.* (edit. 1870, vol. i. p. 237).

The reason of the thing seems to be in favour of these opinions.

In a case determined by the tribunal of the German Empire, merchandise sent from Bohemia to London fell into the hands of an agent for transmission (*expéditeur de Hamburg*) at Hamburg at the moment when the consignee (*le destinataire de Londres*) became bankrupt. The consignor thereupon claimed a right of stoppage *in transitu* (*une demande en revendication*) against the transmission agent at Hamburg. The latter maintained that he had a right of detention as a set-off against debts due to him from the London consignee. The tribunal, taking the laws of Hamburg as its basis, decided against the Hamburg claimant (*y*).

DCCCXXXIV.A. Upon the analogous question of demanding back goods before the vessel, on board of which they were put, had sailed, the following English case is important.

Count for freight, payable in advance at L. two months after the ship should sail, for goods placed on board plaintiff's ship, there to be carried on a voyage to P.

Plea: that, after a reasonable time for sailing, and a reasonable time before the ship sailed, defendant demanded back his goods at L., and plaintiff would not re-deliver them. Replication: that the captain had signed bills of lading making the goods deliverable at P. to D. or assigns, and had delivered these bills of lading to defendant, and that defendant had transmitted one of them to D. at P. before he demanded the goods back. That defendant would not, when he demanded back his goods, restore the bills of lading, or indemnify the plaintiff against those who might become holders of them and claim the goods at P. Rejoinder: that D. was, and

(*y*) "Cette décision, fortement motivée, est d'une importance toute particulière en raison du caractère international du *Right of Stoppage*" (*Journal du Droit Inter. Privé*, vol. i. p. 131).

plaintiff knew he was, only agent for defendant, and having no interest in the bills of lading.

On demurrer it was holden, that a person who has shipped goods on a general ship is not entitled at pleasure to demand them back without payment of the freight; and that the plea did not show such a delay in the sailing of the ship as to be a breach of contract on the part of plaintiff, and therefore that it was not necessary to decide whether such a delay would have been a defence to the action; the plea being bad at all events. It was also holden that the replication was good, and that the rejoinder was no answer, inasmuch as plaintiff might be liable to an assignee of D. if the goods were not forthcoming at P. (*z*).

DCCCXXXIV.B. Some miscellaneous points may be mentioned before this chapter is closed—one as to a ship being prevented by the Queen's enemies from fulfilling her contract.

The Declaration stated that plaintiff and defendant agreed by charter-party that plaintiff's ship should proceed to Odessa, and there load from defendant's agent a cargo of specified goods, and therewith proceed home—a specified number of running days to be allowed for loading and unloading, and ten days for demurrage after the laying days; that the ship proceeded to Odessa; that the time for loading had elapsed, but defendant made default in loading.

Plea: that, after the vessel proceeded to Odessa, and before the alleged breach of contract, war was declared by the Queen against the Emperor of Russia, and war had ever since existed between this kingdom and Russia, of which plaintiff and defendant had notice before the alleged breach; that Odessa was part of the Empire of Russia; and plaintiff and defendant were subjects of this kingdom, and not of Russia; that the ship was a registered

(*z*) *Tindall* v. *Taylor* (1854), 4 *Ellis & Blackburn, Rep.* p. 219.

British ship, and no license from the Queen could be obtained for loading the ship at Odessa; that defendant could not have procured a cargo or loaded the ship as agreed, nor could plaintiff have received such cargo, without trading or corresponding with the enemy. Issue on this plea.

It was proved that the master was directed by defendant to apply to defendant's agent M. at Odessa. War between England and Russia was first known at Odessa on April 1, 1854, which was before the expiration of the running days. M., before April 1, repeatedly told the master that he should be unable to procure a cargo, owing to a Russian prohibition; and he also endeavoured to persuade the master to quit Odessa without a cargo, upon certain terms inconsistent with the charter-party. The master continued to demand a cargo till after April 1, and on a later day, but before the expiration of the running and demurrage days, left Odessa in ballast.

On appeal from the Court of Queen's Bench, it was ruled by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the plea was proved (*a*).

DCCCXXXIV.c. Another miscellaneous point is the following:—

It has been ruled that the Law of England does not apply to goods on board a foreign ship bound for but not reaching England.

In *Cammell* v. *Sewell*, Lord Chief Justice Cockburn said,—that though the goods were the property of English owners, yet, as they never were on board a British ship, and never reached British territory, the Law of England never attached to them, and therefore could not apply to the case (*b*).

(*a*) *Reid* v. *Hoskins* (1856), 6 *Ell. & Blackb. Rep.* p. 953.
(*b*) *Cammell* v. *Sewell* (1860), 5 *Hurl. & Norm. Rep.* at pp. 746 7.

DCCCXXXIV.D. Upon the question as to what is a safe port, the following English decision is important:—

The defendants chartered a ship to proceed from England to a "safe port" in *Chili*, with leave to call at *Valparaiso*. On her arrival at *Valparaiso*, the charterers' agent named the port of *Carrisal Bajo* as the port of discharge, and directed the master to proceed thither. At the time *Carrisal Bajo* was named as the port of discharge, that port was closed by order of the Chilian Government, and the ship could not proceed thither without confiscation. The ship was consequently detained for some time at *Valparaiso*, and, on the port being opened, sailed for *Carrisal Bajo*, and there discharged her cargo. It was holden, that the charterers were liable in damages to the shipowner for the detention of the ship at *Valparaiso*, as they had not named a "*safe* port" within the meaning of the charter-party (*c*).

In the case of the *Teutonia* (*d*), the vessel, which was a Prussian ship, was chartered to bring a cargo from South America to Falmouth, for orders to a safe port in Great Britain, or on the Continent, between Havre and Hamburg. One of the excepted perils of the bills of lading, which were in English form, was "the Queen's enemies." The vessel arrived at Falmouth on July 10, 1870, at a time when the war between France and Prussia was apparently imminent, and the next day was ordered to Dunkirk, in France. Off Dunkirk she was informed, on the 16th, by a pilot, that war had broken out. She sailed away to the Downs, [and anchored there on the 17th, which was a Sunday;] her master telegraphed for orders on the 18th, and was told on the 19th not to go into Dunkirk. [She at once put into Dover, and on the same day war was formally declared by France.] It was holden that the master was justified, upon the information he

(*c*) *Ogden* v. *Graham* (1861), 1 *Best & Smith, Rep.* p. 773.
(*d*) *L. R.* 3 *Adm.* p. 394.

received, in taking a reasonable time to make inquiries as to the war, and was not bound, after it had broken out, to enter Dunkirk. The plaintiffs, who were the owners of the cargo, demanded it, after the 19th, at Dover, where the vessel [had remained, but made no definite offer] to pay any freight. They were refused, and then arrested the ship. The Admiralty Court held that they were bound, at least, to pay *pro ratâ* freight; the Privy Council held that, in the circumstances, they were bound to pay full freight; and the suit was therefore dismissed.

DCCCXXXIV.E. In the *Patria* (*e*), another case arising out of the Franco-German war, a German vessel, bound to deliver a cargo at Hamburg, put into Falmouth on account of sickness. Being there, her master learnt that Hamburg was blockaded; and the vessel stayed at Falmouth. The blockade was shortly afterwards raised, but the vessel remained at Falmouth, for fear of capture from cruisers; and her master refused to give delivery [of a portion of the cargo consigned to the plaintiffs, who demanded it there, and offered to pay full freight.] It was holden that both the refusal of the master to proceed after notification of the raising of the blockade, and his refusal to deliver the portion of the cargo, were unjustifiable.

In the *Heinrich* (*f*), the *San Roman* (*g*), and the *Express* (*h*), somewhat similar cases, there were the further excepted perils of "the Queen's enemies and restraint of "princes and rulers;" and on this, and on the particular facts, the delays were holden justifiable.

(*e*) *L. R.* 3 *Adm.* p. 436.
(*f*) *Ibid.* p. 424.
(*g*) *Ibid.* p. 583.
(*h*) *Ibid.* 597. See also *The Wilhelm Schmidt*, 1 *Aspinall's Maritime Law Cases*, p. 82; and *Geipel* v. *Smith*, *L. R.* 7 *Q. B.* p. 404.

CHAPTER XLII.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

DCCCXXXV. 2. We have now (*a*) to consider the rules of Comity with respect to that great instrument of Commerce, Negotiable Paper; viz. Bills of Exchange (*Literæ Cambii, Lettres de Change, Gezogene Wechsel*) and Promissory Notes (*aa*).

[A Cheque, it may be observed, is in this country considered to be "a bill of exchange drawn on a banker "payable on demand" (*b*).]

This subject was, on account of its importance and certain peculiarities incident to it, not included in the foregoing chapters on Obligations, but reserved for special consideration, though the general principles of the law relative to them are, of course, applicable to Bills and Notes.

[(*a*) *Suprà*, § dcccx.]

(*aa*) See generally *Byles on Bills* (14th edit. 1885), chap. xxiv., "Of the effect of Foreign Law relating to Bills of Exchange and Promissory Notes."

[The English and Scotch Law on Bills, Cheques, and Notes has been codified by 45 & 46 Vic. c. 61.]

Story on Bills, chap. v. ss. 129–178. *Savigny, R. R.* viii. s. 364, num. 3 (Wechselrecht).

Fœlix (edit. 1856), tome i. pp. 76, 160, 177, 181 note (b), 224 note (a), 244, & 328; [(ss. 32, 80, 85, 88 note (b), 101 note (a), 119, & 172.)]

Massé, Droit Commercial, liv. ii. tit. ii. nos. 589–591, et passim; see index to that work.

[*Nouguier, Lettres de Change* (Paris, 1875), chap. xiv., "De la lettre de change dans ses rapports avec les étrangers."

Borchardt, Wechsel-Gesetze aller Länder (Berlin, 1871).]

[(*b*) 45 & 46 Vic. c. 61, s. 73.]

DCCCXXXVI. The contract of a Bill of Exchange, like other contracts in this respect, must be considered with reference to—

(1.) The *lex domicilii*, the law which governs the personal capacity to contract.

(2.) The *lex loci contractûs*, [or law of the place where the contract is made.]

(3.) The *lex loci solutionis* [or law of the place of payment.]

(4.) The *lex fori*.

DCCCXXXVII. First, as to the *lex domicilii*, or the personal capacity to enter into this contract.

A Bill of Exchange must be considered with reference to the different persons interested or concerned in it, such persons being, according to the nomenclature of English law, the drawer, the payee, the acceptor, the indorser, [the indorsee, the bearer.]

A bill is, in the technical phrase, said to be *honoured* when it is duly accepted; when it becomes payable by lapse of time it is said to have *arrived at maturity*; and, when acceptance or payment thereof is refused, it is said to be *dishonoured* (*bb*). [An "inland bill," in this country, is a bill which is, or on the face of it purports to be, (i.) both drawn and payable within the British Islands, or (ii.) drawn within the British Islands upon some person resident therein. Any other bill is a "foreign bill" (*c*).]

It has been established as a general principle in the English Courts that the liabilities of the drawer, the acceptor, and indorser, must be governed by the laws of the countries in which the drawing, acceptance, and indorsement respectively took place.

[DCCCXXXVII.A. Questions of conflicting laws are now met by the rules contained in the seventy-second

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(*bb*) *Story on Bills*, s. 126.

[(*c*) 45 & 46 Vic. c. 61, s. 4. "British Islands" means any part of the United Kingdom, the islands of Man, Jersey, Guernsey, Alderney, and Sark, and any adjacent islands subject to Her Majesty.]

section of the "Bills of Exchange Act, 1882" (45 and 46 Vic. c. 61), which provides as follows:—

"Where a bill drawn in one country is negotiated, "accepted, or payable in another, the rights, duties, and "liabilities of the parties thereto are determined as "follows:—"

"(1.) The validity of a bill as regards requisites in "form is determined by the law of the place of issue, and "the validity as regards requisites in form of the super- "vening contracts, such as acceptance, or indorsement, or "acceptance suprà protest, is determined by the law of "the place where such contract was made."

"Provided that—

"(a) Where a bill is issued out of the United Kingdom "it is not invalid by reason only that it is not stamped "in accordance with the law of the place of issue:"

"(b) Where a bill, issued out of the United Kingdom, "conforms, as regards requisites in form, to the law of "the United Kingdom, it may, for the purpose of enforc- "ing payment thereof, be treated as valid as between all "persons who negotiate, hold, or become parties to it in "the United Kingdom."

"(2.) Subject to the provisions of this Act, the inter- "pretation of the drawing, indorsement, acceptance, or "acceptance suprà protest of a bill, is determined by the "law of the place where such contract is made."

"Provided that where an inland bill is indorsed in a "foreign country the indorsement shall, as regards the "payer, be interpreted according to the law of the United "Kingdom."

"(3.) The duties of the holder with respect to present- "ment for acceptance or payment and the necessity for "or sufficiency of a protest or notice of dishonour, or "otherwise, are determined by the law of the place where "the act is done or the bill is dishonoured."

"(4.) Where a bill is drawn out of but payable in the "United Kingdom and the sum payable is not expressed "in the currency of the United Kingdom, the amount

" shall, in the absence of some express stipulation, be cal-
" culated according to the rate of exchange for sight drafts
" at the place of payment on the day the bill is payable.

" (5.) Where a bill is drawn in one country and is
" payable in another, the due date thereof is determined
" according to the law of the place where it is payable."]

DCCCXXXVIII. The English law, which looks exclusively to the *lex loci contractûs* in contracts, and excludes all consideration of personal capacity by the law of the domicil, has some advantage over the foreign law in this particular instance. Savigny admits that there is no matter on which there exists such a variety of local and personal law as on the personal capacity of the drawer of a bill of exchange. Some foreign writers endeavour to get rid of the difficulty, and still adhere to the general doctrine respecting the personal statute following the person everywhere, by allowing in this instance a *special* capacity of the drawer, derived from the place where the act is done, though in other respects his *general* capacity still remains governed by the law of the domicil. Savigny rejects this rather lame device, and maintains that upon true and sound principles the law of the domicil must decide the question of capacity; but such is the difficulty of the case that it demands, he thinks, positive legislation in each state upon the subject.

DCCCXXXIX. [The Law of Bills of Exchange (*cc*) which now prevails] throughout the whole of Germany removes, so far as that country is concerned, all practical difficulty connected with the subject. By that law every subject capable of entering into any contract is capable of being the drawer of a bill of exchange.

(*cc*) *Allgemeine Deutsche Wechsel-Ordnung*, a law drawn up after a conference held at Leipsic, and published on November 26, 1848. Some changes and additions were made, after further conferences at Nuremberg held in 1858 and 1861, and are known as the "Nürnberger Novellen." All the States of Germany, at various dates, adopted this Law; and Austria, after having made some modifications, also accepted it. *Borchardt, Wechsel-Gesetze*, Band I. xi. Deutschland, pagina 85.]

And with respect to foreigners, though the personal capacity is to be governed by the law of the domicil, yet, whosoever is concerned with the making of a bill of exchange in a foreign state, is to be treated as capable of doing so, if he is [capable, according to the German law (*d*).]

DCCCXL. There does not appear to be any direct authority in French (*dd*) jurisprudence upon the subject of the capacity of the drawer being regulated by the law of his domicil: but, according to general principles, the capacity would in that state be regulated by that law.

DCCCXLI. In most of the states on the European continent the law has affixed an incapacity upon all but certain specified classes to be parties to bills of exchange. It may be doubted whether the English courts would recognize this incapacity, though, according to all sound principles of Comity, they ought to do so. It is a matter, however, which has not yet received any judicial decision (*e*) in England, nor in the United States of America (*ee*).

[(*d*) Art. 84. "Die Fähigkeit eines Ausländers wechselmässige Verpflichtungen zu übernehmen, wird nach den Gesetzen des Staates beurtheilt, welchem derselbe angehört. Je doch wird ein nach den Gesetzen seines Vaterlandes nicht wechselfähiger Ausländer durch Uebernahme von Wechselverbindlichkeiten im Inlande verpflichtet, insofern er nach den Gesetzen des Inlandes wechselfähig ist." *Allgemeine Deutsche Wechsel-Ordnung mit den Nürnberger Novellen.* Abschnitt II. "Von gezogenen Wechseln," xv. "Ausländische Gesetzgebung," Art. 84. See, too, Art. 85, and Art. 86. *Borchardt, ubi sup.*, pagina 100.]

(*dd*) The French Law on the general subject will be found in the *Code de Commerce*, liv. i. tit. viii. "De la Lettre de Change, du Billet à ordre, et de la Prescription." In the edition of this Code, 1836, by Dr. Sautayra, there is a perspicuous little preface to the above title. It will be found printed in a note at the end of this chapter. [Nouguier (*Lettres de Change*, tome ii. s. 1413) collects the authorities on Capacity, and refers it to the Law of the domicil.]

(*e*) See *Westlake*, 1st ed., §§ 348, 401 ; 2nd ed., chap. iii. § 2.

(*ee*) *Story on Bills*, chap. iv. Competency and Capacity of Parties to Bills.

DCCCXLII. In England (*f*) and the United States (*ff*) the incapacity is the exception, and not the rule, and is confined to the following classes:—

i. Minors.

ii. [Certain corporations.]

iii. Alien enemies (*g*).

iv. Insane and imbecile persons. And in England also,

v. Clergymen—so far as engaging in the traffic of bills of exchange for a livelihood is concerned—an incapacity which is in accordance with the general Canon Law.

[Married women would formerly have been added, but now in England under the "Married Women's Property "Act 1882," and in some States of the U. S. A., they can incur liability as parties to bills or notes.]

Otherwise, these states adopt the general law laid down by Heineccius,—Nullum est dubium, quin cambiare possint quicumque possunt contrahere, nisi id leges cambiales speciatim prohibeant (*h*).

DCCCXLIII. Secondly (*i*), as to the *lex loci con-*

[(*f*) "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

"Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto." 45 & 46 Vic. c. 61, s. 22.]

(*ff*) *Story on Bills*, ss. 81, 82.

(*g*) This restriction does not apply to a *neutral* drawer or indorser of an alien enemy, or to a bill drawn by one alien enemy upon another in favour of a neutral, so far as the latter is concerned. So as to an indorsement. See *Story on Bills*, s. 104.

(*h*) *De Jure Camb.* c. v. §§ 1, 2, 13, 14; *Story on Bills*, s. 71, [so quotes the passage, but gives the sense, not the words, of Heineccius].

(*i*) *Story on Bills*; see *Allen* v. *Kemble*, 6 *Moore, P. C. Rep.* at p. 323, for the high authority of this work in England.

tractûs. The general principles respecting conventions contrary to public morality or public policy, of course apply to the particular contract, which assumes the form of a Bill of Exchange; and the English courts apply to these instruments that questionable doctrine of refusing to take notice of the Revenue Laws (*k*) of a foreign state (*l*); so far, at least, as to hold that a document which, by the Law of a foreign country, is not admissible in evidence for want of a stamp, may, nevertheless, be admitted in England. [And, as we have seen (*m*), a bill of exchange issued outside the United Kingdom may be valid in this country, although not stamped in accordance with the law of the place of its issue.]

The English Government has, however, taken care of its own revenue in this matter, and imposed a stamp duty on bills drawn or expressed to be payable, or actually paid, or indorsed, or in any manner negotiated in the United Kingdom (*n*).

DCCCXLIV. It may be well to observe that a bill purporting to be drawn abroad [is, for the purposes of the Stamp Act 1870, to be deemed to have been] so drawn, though [it may in fact have been drawn within the United Kingdom (*o*).]

The courts of the United States have rightly holden that if the protest of a bill of exchange, made in another state, is required by the laws of that state to be under

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Byles on Bills, chap. xxiv. There appear to have been no less than three American editions of this most useful little work.

Ross, Leading Cases in Commercial Law, vol. i. pp. 792, 804, 812, 841, 847, 877.

(*k*) *Vide antè*, vol. ii. § xxxi., and App. ii.

(*l*) *James* v. *Catherwood*, 3 *Dowling & Ryland, Rep.* p. 190.

Wynne v. *Jackson*, 2 *Russell, Rep.* p. 351.

Holman v. *Johnson*, 1 *Cowper, Rep.* p. 341 (Lord Mansfield).

[As to unstamped documents, *vide infrà*, § dccccxxiv. A.]

[(*m*) *Suprà*, § dcccxxxvii.A.]

(*n*) 33 & 34 Vic. c. 97, ss. 51, 52 & Schedule *tit.* Bill of Exchange.

(*o*) See s. 52 of 33 & 34 Vic. c. 97.

seal, a protest, not under seal, will not be regarded as evidence of the dishonour of the bill (*p*).

DCCCXLV. Under this head of the *lex loci contractûs* the decisions of the English courts have established the following maxim:—

That an *acceptance* void, or avoided, by the Law of the country where it is given is not binding in England.

This maxim England has enforced through her courts of equity. It is illustrated by a case, in which it appeared that by the law of Leghorn, if a bill were accepted, and the drawer then failed, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance became void. An acceptor at Leghorn, under the circumstances, instituted a suit at Leghorn, and his acceptance was thereupon vacated. Afterwards he was sued at law in England as acceptor; by way of defence he filed his bill for an injunction and relief, and Lord Chancellor King granted a perpetual injunction, enjoining the plaintiff at law from suing on the bill of exchange (*q*).

Upon the same principle a written agreement, of the kind called in England an I O U, given for money lent for the purpose of playing at games of chance, being an unlawful agreement in England, but a lawful agreement in the country where it was given, has been holden valid in England (*r*). So the payment of part in discharge of the whole of a debt, though ineffectual by the law of England, has, nevertheless, been holden effectual to bar the whole debt in England, it having been shown to be effectual for that purpose, according to the law of the country in which the bill was negotiated, and the payment

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(*p*) *Story on Bills*, s. 138; *Conflict of Laws*, s. 260 *a*.
(*q*) *Burrows* v. *Jemino*, 2 *Strange*, *Rep.* p. 733.
Wynne v. *Calendar*, 1 *Russell*, *Rep.* p. 293.
Byles on Bills, chap. xxiv. p. 386.
(*r*) *Quarrier* v. *Colston*, 12 *L. J.* (*Chan.*), p. 57.

having been made, when the bill was due and payable, and in the hands of the true holder (*s*).

DCCCXLVI. The following cases relate to the important question of *indorsement* as governed by the *lex loci contractûs*.

A bill of exchange was drawn, and indorsed by the payee in blank in a country, in which each of the parties, the drawer and the payee, were, at the respective times of drawing and indorsing, domiciled; and in which the indorsement in blank did not operate as a transfer of the note; this indorsement was holden void in England, although in England an indorsement in blank operates as a complete transfer, because the foreign law in this case, and not the domestic law which regulated the mode of suing, was the law by which the contract was governed (*t*).

But to an action by the indorsee of the drawer against the acceptor of a bill of exchange drawn in England, accepted in England, and payable in England, it is no answer that the indorsement was made in France, and was not conformable to the law of France; nor in such action is it any answer that the drawer indorsed the bill immediately to the plaintiff, and that the plaintiff and the drawer, when the bill was made and indorsed, were resident and domiciled in France, and were subjects of that empire (*u*).

DCCCXLVII. In the United States the question of the different obligations created by indorsements in different states often arises. Story (*x*) observes, that "by

(*s*) *Ralli* v. *Dennistoun*, 6 *Exch. Rep.* p. 483 (1851).

(*t*) *Trimby* v. *Vignier*, 1 *Bingham, New Cases*, p. 151 (A.D. 1834). The decision in this leading case, by Tindal, C. J., overrules that of Vice-Chancellor Leach (A.D. 1826) in *Wynne* v. *Jackson*, 2 *Russell, Rep.* p. 351.

(*u*) *Lebel* v. *Tucker*, *L. R.* 3 *Q. B.* p. 77.

[See *Bradlaugh* v. *De Rin*, *L. R.* 3 *C. P.* p. 538, and 5 *C. P.* p. 473; *Re Marseilles Extension Railway and Land Company*, *L. R.* 30 *Ch. D.* p. 598; and cf. *Lee* v. *Abdy*, *L. R.* 17 *Q. B. D.* p. 311.]

(*x*) *On Bills*, s. 157 [and *Conflict of Laws*, s. 316 *b*].

" the general Commercial Law, in order to entitle the in-
" dorsee to recover against any antecedent indorser upon
" a negotiable note, it is only necessary that due demand
" should be made upon the maker of the note at its
" maturity, and due notice of the dishonour given to the
" indorser. But, by the laws of some of the American
" states, it is required, in order to charge an antecedent
" indorser, not only that due demand should be made, and
" due notice given, but that a suit should be previously
" commenced against the maker, and prosecuted with
" effect in the country where he resides; and, then, if
" payment cannot be obtained from him under the judg-
" ment, the indorsee may have recourse to the indorser.
" In such a case, it is clear, upon principle, that the in-
" dorsement, as to its legal effect and obligation, and the
" duties of the holder, must be governed by the law of the
" place where the indorsement is made. And it appears
" that a decision to this effect was given in the case of a
" note made and indorsed in the state of Illinois (*y*). In
" that case, Mr. Chief Justice Shaw, in delivering the
" opinion of the court, said, 'The note declared on being
" ' made in Illinois, both parties residing there at the
" ' time, and it also being indorsed in Illinois, we think
" ' that the contract created by that indorsement must be
" ' governed by the law of that state. The law in question
" ' does not affect the remedy, but goes to create, limit,
" ' and modify the contract effected by the fact of indorse-
" ' ment. In that, which gives force and effect to the
" ' contract, and imposes restrictions and modifications
" ' upon it, the law of the place of contract must prevail,
" ' when another is not looked to, as a place of perform-
" ' ance ' " (*z*).

[(*y*) *Williams* v. *Wade*, 1 *Metcalfe*, *Rep.* pp. 82, 83.

(*z*) Cf. *Freese* v. *Brownell*, 35 *New Jersey Rep.* p. 285; *Downer* v. *Chesebrough*, 36 *Connecticut Rep.* p. 39.

See further *Story*, *Conflict of Laws*, ss. 316 *c*, 317. *On Bills*, s. 158.]

DCCCXLVIII. In England a bill of exchange, or promissory note, [was] not transferable by indorsement unless it [were] payable "to the bearer" or "to order;" but in Scotland [it was so] transferable, without these conditions. In a case (*a*) which came before the Scotch courts in 1843, it was [holden that a Scotch promissory note was] transmissible by indorsement in England (*b*).

DCCCXLIX. In the matter of bills of exchange, as of other contracts, (*c*) the *lex loci contractûs* governs the *construction* of the instrument, where the contract is not express, while, if it be special, the construction must be in accordance with the express terms in which it is made (*d*).

A bill drawn upon a third person in discharge of a present debt is, in truth, an offer by the drawer that, if the payee will give time for payment, he, the drawer, will give an order on his debtor (the acceptor) to pay a given sum at a given time and place. The payee agrees to accept this order, and to give the time, with a proviso, that if the acceptor do not pay, and he the payee (or the holder of the bill) give notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, with lawful interest; but the question still remains as to whether the drawer incurs any obligation that the bill shall be paid at any, and, if at any, at what particular place. The answer of the English law, in conformity with the reason of the thing, and with the doctrine of general jurisprudence on this

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(*a*) *Robertson* v. *Burdekin*, 1 *Ross, Leading Cases*, p. 812. [*Decisions in Court of Session*, 2nd series, vol. vi. p. 17.]

[(*b*) See, now, 45 & 46 Vic. c. 61, s. 8, subs. 4.]

(*c*) In the following part of this section I have adopted, with little alteration, the very words of our distinguished judges, the late Baron Alderson (*Gibbs* v. *Fremont*, 9 *Exch. Rep.* at p. 30) and the late Mr. Pemberton Leigh (Lord Kingsdown) (*Allen* v. *Kemble*, 6 *Moore, P. C. Rep.* at pp. 321-2).

[See *In re Gillespie, Ex parte Robarts, L. R.* 18 *Q. B. D.* p. 286; *In re Commercial Bank of South Australia, L. R.* 36 *Ch. D.* p. 522.]

(*d*) See an important judgment of the Supreme Court of Pennsylvania, *Lennig* v. *Ralston*, 23 *Pennsylvania State Rep.* p. 137 (1854).

point, is as follows:—The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicil of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicil of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, and with his interest, damages, and costs, as the law of the country where he contracted may allow. In every case of a bill drawn in one country upon a drawee in another, the intention and the agreement are, that the bill shall be paid in the country upon which it is drawn. If this payment be not so made, the drawer is liable, according to the laws of the country where the bill was drawn, and not of the country upon which the bill was drawn (*dd*).

DCCCL. Thirdly, as to the *lex loci solutionis*. In the case of *De la Chaumette* v. *Bank of England* (*e*), it was decided that a promissory note payable to bearer, made and payable in England, was transferable by delivery abroad, although by the law of the country where the delivery took place mere delivery was inoperative. In this case the *lex loci solutionis* was admitted to govern the contract (*f*).

DCCCLI. According to the English and United States law, a contract to pay *generally*, without any specification of place, is governed by the law of the place where it is

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[(*dd*) The measure of damages, according to British law, against parties to a dishonoured bill is regulated by s. 57 of 45 & 46 Vic. c. 61.]

(*e*) 9 *Barn. & Cress.* p. 208; and case between same parties, 2 *Barn. & Adol.* p. 385; *Byles on Bills*, p. 388.

[(*f*) See *M'Lean* v. *Clydesdale Banking Co.*, *L. R.* 9 *App. Ca.* at p. 114.]

made (*g*). This doctrine is consistent with holding that [a debt created by] such a contract is payable *anywhere* (*h*).

DCCCLI.A. The time of payment is to be calculated according to the *lex loci solutionis*. This law therefore governs the question as to whether days of grace are to be allowed and their number (*hh*).

DCCCLII. Fourthly, we have to consider the *lex fori* in its application to this subject (*i*).

The English courts had at one time holden that *protest* and *notice of dishonour* are parcel of the contract formed by a bill of exchange, and that they are not incidents of the remedy belonging to the breach of the contract, and that therefore both protest and notice of dishonour must be regulated by the law of the country where the bill was payable (*k*). But this doctrine may be said to have been greatly shaken, if not entirely overthrown, by later decisions, which established, contrary to former decisions, that the drawer [was] liable according to the law of the country where the bill is drawn; and that the liabilities of the indorser [were] governed by the law of the country of the indorsement (*l*).

(*g*) *Don* v. *Lippmann*, 5 *Clark & Finn. Rep.* pp. 12, 13.
Story, Conflict of Laws, s. 317.
(*h*) *Story, ibid.*
[(*hh*) This was § dcccIvii. in previous editions.]
See *Story on Bills*, s. 155.
[*Byles on Bills*, p. 388.
Rouquette v. *Overmann*, *L. R.* 10 *Q. B.* p. 525; 45 and 46 Vic. c. 61, s. 72, subs. 5. *Suprà*, § dcccxxxvii.A.]
[(*i*) See *Macfarlane* v. *Norris*, 2 *Best & Sm. Rep.* p. 783.]
(*k*) *Byles on Bills*, pp. 388, 392.
(*l*) *Rothschild* v. *Currie*, 1 *Q. B. Rep.* p. 45; *Gibbs* v. *Fremont*, 22 *L. J. N. S.* (*Ex.*) p. 304; *Cooper* v. *Lord Waldegrave*, 2 *Beavan, Rep.* p. 282; *Allen* v. *Kemble*, 6 *Moore P. C. Rep.* at p. 321. [*Rouquette* v. *Overmann*, *L. R.* 10 *Q. B.* at pp. 540 *et seq.*]
Byles on Bills, p. 388; cf. with p. 392.
Story, Conflict of Laws, s. 360.
[*Horne* v. *Rouquette*, *L. R.* 3 *Q. B. D.* p. 514.]
Hirschfield v. *Smith*, *L. R.* 1 *C. P.* p. 340.

[But now by 45 & 46 Vic. c. 61, s. 72, subs. (3) "the "duties of the holder with respect to presentment for "acceptance or payment and the necessity for or sufficiency "of a protest or notice of dishonour are determined by the "law of the place where the act is done or the bill is "dishonoured" (*m*).]

DCCCLIII. A promissory note may be made and dated in a particular country and made payable in a *currency* which obtains in several countries, under the same denomination but with a different value. In which currency is the note to be paid?

The answer of the English courts is—In the currency of that country in which the note is payable; that will be, as has been seen, either in a place specified in the instrument itself, or, in default of such specification, in the place in which the note is made—that being, according to the presumption of law, the place in which the parties intended it to be payable (*o*).

DCCCLIV. The English courts have holden that if a bill be drawn in a country, where the *interest* is twenty-five per cent., on a drawee in a country where the interest is only six per cent., the higher rate of interest is recoverable against the drawer, but the lower rate against the acceptor, who accepted the bill in the country in which the lower rate prevailed (*p*).

DCCCLV. It may be useful to observe, with reference to the administration of law in England, that in cases of

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[(*m*) *Vide suprà*, § dcccxxxvii. A.]

(*o*) *Kearney* v. *King*, 2 *Barn. & Alderson*, *Rep.* p. 301.

Sprowle v. *Legge*, 1 *Barn. & Cress. Rep.* p. 16 (A.D. 1822).

See *Byles on Bills*, chapter xxiv. pp. 387–392; *Story*, *Conflict of Laws*, s. 272.

(*p*) *Allen* v. *Kemble*, 6 *Moore*, *P. C. Rep.* p. 314 (A.D. 1848), and *Gibbs* v. *Fremont* (A.D. 1853, Baron Alderson's Judgment), 9 *Exchequer Rep.* p. 25, are the leading English cases. When Lord Langdale decided the case of *Cooper* v. *Lord Waldegrave*, 2 *Beavan*, *Rep.* p. 282 (A.D. 1840), he remarked how little there was to be found in English decisions upon the subject.

this description the *rate* of interest is a question of law for the judge to decide, and is not left, as English lawyers speak, to the jury: but the amount of the interest in each place is to be so left, and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact (*q*).

DCCCLVI. The English courts consider that if the interest be expressly or by necessary implication specified on the face of the instrument, then the interest is governed by the terms of the contract itself. But if not, it seems to follow the rate of interest of the place where the contract is made (*r*).

DCCCLVII. (*s*).

(*q*) *Gibbs* v. *Fremont*, 9 *Exchequer Rep.* p. 25.

(*r*) *Ibid.*

[In *Stickney* v. *Jordan*, 58 *Maine Rep.* p. 106, and *I. G. Thompson*, *Amer. Rep.* vol. iv. p. 251, a promissory note was made in New Hampshire, payable, with annual interest, to a resident in that State. An indorsee having brought an action in Maine was there held entitled to compound interest on the note, because such was the interest allowed by the law of New Hampshire.]

[(*s*) This section is now dcccli. A.]

NOTE TO THE FOREGOING CHAPTER.

PRÉFACE, IN DR. SAUTAYRA'S EDITION, 1836, TO THE EIGHTH TITLE OF THE FIRST BOOK OF THE FRENCH COMMERCIAL CODE (*a*).

"DE LA LETTRE DE CHANGE.

"Les lettres de change étaient inconnues chez les Grecs et chez les Romains. Les historiens ne s'accordent point sur l'époque où elles ont commencé à être en usage. Les uns prétendent que nous en devons l'invention aux Juifs, qui, chassés de France et établis en Lombardie, avaient trouvé le moyen de retirer leurs fonds, confiés par eux entre les mains de leurs amis, en se servant de lettres secrètes, et conçues en peu de mots. D'autres l'attribuent aux Florentins de la faction Guelphe, lorsque, chassés par les Gibelins, ils se retirèrent en France et dans d'autres lieux de l'Europe. Mais, sans s'arrêter à toutes ces conjectures, ne vaut-il pas mieux, avec l'orateur du gouvernement, chercher l'origine de la lettre de change dans les progrès du commerce, dans l'extension des relations commerciales, qui en a été la suite, et qui a produit la nécessité de balancer les valeurs réciproquement acquises, ou déposées par les négocians éloignés les uns des autres, et mutuellement créanciers et débiteurs? Cependant, une loi de Venise, rapportée par *Nicolas de Passeribus* dans son livre Script. Privat. livre 3, prouve que les lettres de change étaient en usage dès le 14e siècle. Le monument le plus ancien de notre législation où il soit question de lettres de change, est une ordonnance de Louis XI de 1462. Le mot *change* a deux acceptions : dans l'une, il exprime le profit qu'on tire de l'opération ; dans l'autre, l'opération elle-même. On distingue deux sortes d'opérations de change : l'une, que les docteurs appellent *cambium reale vel manuale*, qui n'est que le change d'une espèce de monnaie. On nomme *changeurs* ceux qui exploitent cette espèce de change. L'autre opération de change, que l'on nomme *cambium locale, mercantile, trajectitium*, est le contrat de change proprement dit. Ce contrat n'est autre chose qu'une convention par laquelle une personne, moyennant une somme d'argent qui lui est remise ou promise dans un lieu, s'oblige à

(*a*) *Vide suprà*, § dcccxl.

faire payer à la personne qui la lui remet une même somme dans un autre lieu et dans un temps convenu. On appelle *banquiers* les commerçans qui se livrent à cette seconde branche d'opérations de change. Ce contrat s'exécute au moyen de la lettre de change. On définit généralement la lettre de change une lettre revêtue des formes prescrites par la loi, par laquelle une personne mande à son correspondant dans un certain lieu de payer à un tiers ou à son ordre une certaine somme d'argent en échange d'une autre somme, ou de la valeur qu'elle a reçue de ce tiers dans l'endroit où la lettre est tirée. Ainsi, il ne faut pas confondre la lettre de change avec le contrat de change. En effet, cette dernière prouve l'existence du contrat ; elle fournit le moyen d'arriver à son exécution ; mais elle n'est point le contrat même. Mais qu'est-ce que le *change* proprement dit, c'est-à-dire l'opération qui s'exécute au moyen d'une lettre de change ? Est-ce une vente d'argent, un intérêt que l'on retient sur les lettres de change ? Non ; le change est le bénéfice résultant d'un échange d'argent, dans lequel les contractans se distribuent le prix des frais qu'il en coûterait pour faire transporter une somme d'un lieu à un autre. En effet, comme il y a du danger de faire voiturer de l'argent, et qu'il y en a aussi à prendre des lettres de change, puisqu'elles peuvent quelquefois n'être pas payées avec exactitude, il en résulte une balance en parfait équilibre, ou à l'avantage de l'un des contractans, qui rend sa condition meilleure que celle de l'autre. Ajoutez que l'abondance ou la rareté de l'argent, conséquemment la rareté ou l'abondance des lettres de change, et l'opinion de solvabilité du preneur et de celui qui doit la payer est une considération qui fait transiger avec plus ou moins de facilité. Ainsi, le droit de change ne sera donc qu'une espèce de retour de ce qu'au temps où la lettre de change est négociée, suivant le cours de la place, l'argent a plus de valeur que cette lettre de change sur le lieu où elle est payable. Si, par exemple, les négocians de Bordeaux ont beaucoup d'argent à faire payer à des négocians de Marseille, et qu'il y ait peu de lettres de change sur Marseille, les lettres de change gagneront sur l'argent ; le négociant de Marseille qui recevra une lettre de change sur Bordeaux, retirant un avantage de cette négociation, devra donc payer une différence. Dans ce cas, on dit que le change de Marseille sur Bordeaux est *bas*, ou bien qu'il est *pour Bordeaux*. Au cas contraire, on dit qu'il est *haut*, ou qu'il est *pour Marseille*. Le change est *au pair* lorsqu'entre deux villes on donne, par exemple, 1000 fr. dans l'une pour recevoir 1000 dans l'autre. Trois personnes concourent à la formation de la lettre de change : 1—Le *tireur*, qui crée la lettre, en mandant à un tiers, domicilié dans un autre ville, d'en payer le montant ; 2—Le *preneur*, au profit de qui elle est créée, et qui en a donné la valeur au tireur ; 3—L'*accepteur*, sur qui la lettre est tirée, et qui s'engage à la payer. Lorsqu'il n'a point accepté, on le nomme *tiré* ; et *accepteur*, lorsqu'il l'a acceptée. Lorsqu'il y a négociation de la lettre de change, le preneur prend le nom d'*endosseur*, pour désigner que, par son ordre écrit au dos de la lettre de change, il donne à un autre, qui prend le

nom de *porteur*, le droit d'en exiger le paiement. Voyons maintenant quelle espèce de contrat la lettre de change a formée entre ces diverses personnes. Entre le tireur et le preneur, la lettre de change forme le contrat de change ; en effet, le preneur échange ce qu'il donne en un lieu, ou ce qu'il s'oblige à donner au tireur, contre l'argent que le tireur s'oblige de lui faire compter dans un autre lieu au moyen de la lettre de change. Entre le tireur et l'accepteur, c'est un mandat. L'accepteur n'est que le mandataire du tireur. Entre l'endosseur et le porteur il y a deux espèces de contrats : 1—Cession et transport de droits de l'endosseur opérés au moyen de l'endossement ; 2—Contrat de change, par lequel celui à qui l'ordre est passé, c'est-à-dire le porteur, échange l'argent qu'il donne à l'endosseur, dans le lieu où se fait l'endossement, contre l'argent que l'endosseur s'oblige de son côté de lui faire recevoir dans le lieu où la lettre de change qu'il lui remet a été tirée. Ce contrat produit les mêmes engagemens entre l'endosseur et le porteur que ceux que le tireur avait contractés vis-à-vis du preneur. L'accepteur est solidairement obligé avec le tireur envers le preneur, les endosseurs et le porteur. Lorsqu'une négociation se fait au moyen d'un billet, on nomme cet effet, *billet à ordre ; souscripteur*, celui qui le crée et qui doit le payer ; *bénéficiaire*, celui au profit duquel il est souscrit. On appelle *traite*, la lettre de change tirée par un banquier sur son correspondant ; *remise*, celle que le banquier envoie à son correspondant pour en faire le recouvrement, ce que l'on nomme, dans le langage du commerce, *encaisser*. On dit qu'un billet ou une lettre de change est *négocié*, pour indiquer qu'il a été vendu ; quand il est échangé contre un autre ou contre de l'argent, on dit qu'il est escompté ; lorsqu'il a été donné pour solde, on dit qu'il a été *passé à ordre pour solde*."

CHAPTER XLIII.

RIGHTS RELATING TO SUCCESSION.

DCCCLVIII. [HAVING discussed Rights to specific things, and Obligations,] we now approach the consideration—What law ought to govern *the Rights relating to Succession to property*, [whether *Testamento* or *ab Intestato* (*a*).]

These rights grow out of a rule which is, in truth, highly artificial, though so generally incorporated into the Law of all civilized states as to appear natural—the rule that it is competent to a person to extend his power and will beyond the limits of his own existence, and to transfer after his death property to living persons. This will may be either express—that is, by being recorded in a testament (*testatio mentis*) (*b*), and then there is a *testamentary succession*—the heir *succeeds* to the deceased; or it may be tacit—then the law presumes what the intentions of the deceased were, and there is a succession *ab intestato*. The Roman law was philosophical in its conception and precise in its language on this subject: "Nihil est aliud hæreditas, "quàm *successio in universum jus* quod defunctus habuit" (*c*).

By a remarkable fiction it treated the *hæreditas* as a moral person—"Hæreditas enim non hæredis personam,

(*a*) *Vide suprà*, § xxx.
Savigny, *R. R.* viii. s. 366 (at p. 172 of edit. 1849, Berlin), s. 375.
Merlin, *Rép.* Héritier.
[*Story*, *Conflict of Laws*, chaps. xi. xii. and ss. 507-529 *m*.
Bar, §§ 107-114.]

(*b*) "Testamentum ex eo appellatur, quod testatio mentis sit."—*Inst.* lib. ii. t. x.

(*c*) *Dig.* lib. l. t. xvi. 24.

"sed defuncti sustinet" (*d*). And the countries which have adopted this law as the basis of their jurisprudence have the adage, *hæres sustinet personam defuncti* (*e*).

DCCCLIX. [There are three chief] Questions. First—What *Forum* has jurisdiction over the *whole question of the succession*?—that of the *situs*? or that of the domicil?

Donellus examines this question, and concludes, "Ita "relinquitur omnino locus is unus, in quo *controversia* "*hæreditatis* tractanda sit, ubi scilicet qui convenitur "habet domicilium" (*f*). And again: "Nunquam alibi "de hæreditate agi posse, quam ubi possessor domicilium "habeat." That is, the *petitio hæreditatis* should be in the *forum*,—where the heir or representative of the deceased is; though the *petitio rerum singularum*—*e.g.* as to legacies of particular things—may be, perhaps, necessarily preferred before another *forum* (*g*).

DCCCLX. The second Question is—By what law shall

(*d*) *Dig.* lib. xli. t. i. 34, 61; et cf. lib. v. t. iii. 50. ["Hæreditas, etiam sine ullo corpore juris intellectum habet."]

(*e*) *Massé, Droit Commerc.* liv. iii. tit. iv. c. ii. num. 1354.

(*f*) *De Jure Civ.* lib. xvii. c. xvii. 12.

[(*g*) As to jurisdiction in relation to the estates of deceased persons, see *Preston* v. *Lord Melville*, 8 *Cl. & Fin. Rep.* p. 1; *Cook* v. *Gregson*, 2 *Drewry, Rep.* p. 286; *Enohin* v. *Wylie*, 10 *H. L. Cases*, p. 1; *Stirling-Maxwell* v. *Cartwright*, *L. R.* 11 *Ch. D.* p. 522; *Eames* v. *Hacon*, *L. R.* 18 *Ch. D.* p. 437; *In re Hawthorne*, *L. R.* 23 *Ch. D.* p. 743; *In re Klœbe, Kannreuter* v. *Geiselbrecht*, *L. R.* 28 *Ch. D.* p. 175; *Blackwood* v. *The Queen*, *L. R.* 8 *App. Ca.* p. 82; *Ewing* v. *Orr Ewing*, *L. R.* 9 *App. Ca.* p. 34 and 10 *App. Ca.* p. 453; *In re Trufort, Trafford* v. *Blanc*, *L. R.* 36 *Ch. D.* p. 600. In the judgment in this last case it was said (per Stirling, J., at p. 611): "The rule . . . appears to be this, that although the parties claiming to be entitled to the estate of the deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such a case may be bound to ascertain, as best they can, who, according to the Law of the domicil, are entitled to that estate, yet where the title has been adjudicated upon by the courts of the domicil, such adjudication is binding upon, and must be followed by, the courts of this country."

See, too, *Story*, ss. 507-529 *m.*]

the *forum*, so seized of the general subject, decide the points which arise, *mutatis mutandis*, in the matter of *Testamentary succession*, as in the matter of Obligation; namely, as to—

(1) The legal capacity of the testator;

(2) The form of the testamentary instrument;

(3) The dispositions contained in it;

(4) The construction or interpretation of it;

(5) The currency in which legacies and shares [of the estate of a deceased person] are to be paid, and the amount of interest payable on legacies or shares.

[The third Question arises] in the case of succession *ab intestato*, and is—What law ought to govern the rights of parties to the property of the intestate?

Or, in the language of continental jurisprudence, are the *statutes* which govern the matter of succession *personal* or *real*?

DCCCLXI. With respect to the Law generally, applicable both to testamentary succession and to succession *ab intestato*, the jurisprudence of states admits of a threefold division.

i. The jurisprudence which submits the *universitas juris* (both moveable and immoveable property) of the succession to the Law of the last Domicil of the deceased. This is in accordance with the opinion of Savigny, and with the decisions of the superior tribunals of Germany.

ii. The directly opposite jurisprudence, which submits the property to the Law of the Place where it happens to be: which admits the possibility, therefore, of different laws being applied to different portions of the property, and which lays down no principle as to debts and credits, leaving them to be practically dealt with in each case, according to the best expedient which can be devised. This jurisprudence is founded upon the strict feudal law of territorial sovereignty.

iii. The intermediate system of jurisprudence which subjects the personalty to the Law of the Domicil of the

deceased—the realty to the Law of the *Situs*. This is the jurisprudence of England, France (*h*), and the United States of America.

DCCCLXII. Such is the outline of the jurisprudence of the principal States upon the general question of Succession. We have now to consider separately the five points which have been just mentioned, as arising out of Testamentary succession.

DCCCLXIII. (1) As to the legal capacity of the testator. Upon this matter the reader is referred to what has been already said upon the general question of the capacity of the foreigner, both as to contracting a marriage (*i*) and as to acquiring or alienating property (*j*); and to the chapter on personal and real statutes (*k*).

But the answer to this question may be generally stated thus: The Law of the actual Domicil of the testator at the time of making his testament governs the question of his legal capacity to do the act (*l*).

DCCCLXIV. (2) As to the form (*m*) of the testament. The jurisprudence of the continent wisely, justly, and philosophically allows an option (*n*) to the testator to adopt either—

(*a*) The form required by the *lex loci actûs*; or

(*h*) *Fœlix*, liv. i. tit. ii. s. 61, and the authors there cited.

(*i*) *Suprà*, chap. xviii. §§ cccxcv. *et seq.*

(*j*) *Suprà*, § ccclxxxv.B. and chap. xxviii.

(*k*) *Suprà*, chap. xvi.

(*l*) *Story*, s. 465.

(*m*) "De même, la validité d'un testament quant à la forme ne peut être jugée que par le juge du domicile, dont la sentence, rendue dans les formes, doit être reconnue partout. Mais sans toucher à la validité du testament en lui-même, les dispositions qu'il renferme peuvent être constées devant le juge du lieu où les biens sont situés, parce qu'on ne peut disposer de ces biens que conformément aux lois du pays."—*Vattel*, liv. ii. chap. vii. § 85.

(*n*) The object of the Law, as Savigny truly says, is to favour and facilitate, not to thwart, the act of the party. "There can be no doubt," he adds, "that it is facultative, and so allows a choice. This, too, is generally acknowledged. (Dieses ist denn auch meist anerkannt worden.)"—*Savigny*, *R. R.* viii. s. 381, *in fine*.

(β) The form required by the *lex domicilii.*

The adoption of either form is, as jurists say, *facultative*, not *imperative*, though the general maxim be *locus regit actum* (*o*).

England (*p*) and the North American United States (*pp*) used unwisely, arbitrarily, and unphilosophically to compel the testator to adopt the form prescribed by the *lex domicilii.*

DCCCLXIV.A. Now, however, the English Law has been altered and amended by [what is commonly known as "Lord Kingsdown's] Act," 24 & 25 Vict. c. 114, entitled "An Act to amend the Law with respect to Wills of "Personal Estate made by *British* Subjects," passed on the 6th August, 1861 (*q*).

(*o*) *Rocco*, lib. iii. cap. iii. p. 305: "Ond' è che possiamo dirittamente giudicare *quanto erronea* sia la sentenza di quegli autori, i quali, come essenziale alla validità di ogni atto, chiedono l' adempimento esclusivo delle forme del luogo ove esso è celebrato."

Fœlix, s. 83: "Nous tenons pour valable l'acte passé à l'étranger suivant les formes prescrites dans la patrie." Cf. *Code Civil*, arts. 999 and 1317. Yet the *Cour de Cassation* held that it could not pronounce for the validity of a will made in France, but not according to French Law, on the ground that comity required the strict application of the maxim, *locus regit actum.*—*Fœlix*, p. 85, note (*a*).

(*p*) *Vide suprà*, §§ cccxliv-cccxlvi.

Croker v. *Marquis of Hertford*, 4 *Moore, P. C. Rep.* p. 339.

Bremer v. *Freeman*, 10 *Ib.* p. 306. [*Vide suprà*, § cccxlvi.]

[(*pp*) *Story*, s. 468.]

(*q*) *Vide suprà*, § cccxlviii. On moving the second reading of this Bill on April 22, 1861, Lord Kingsdown made the following reference to the remarks in a former edition of this treatise:—

"But I will refer your lordships to treatises of learned men, in which the authorities are collected and discussed, and in which the authors of those treatises have come to the conclusion which I have represented to be the law." He then quoted Mr. Burge, and proceeded: "Dr. Phillimore, who has published his valuable work on International Law much more recently, and has examined, I believe, the works of all the eminent writers on the subject up to the present time, including some distinguished foreign jurists still living, thus sums up the result of his inquiries."

He then cited § dccclxiv. of the first edition of this work.—*Hans. Parl. Deb.* vol. clxii. column 871.

This statute provides as follows:—

Sect. 1. "Every will and other testamentary instrument "made *out of* the United Kingdom by a British subject "(whatever may be the domicil of such person at the time "of making the same, or at the time of his or her death) "shall, as regards *personal* estate, be held to be well "executed for the purpose of being admitted in England "and Ireland to probate, and in Scotland to confirmation, "if the same be made according to the forms required "either by the Law of the place where the same was "made, or by the Law of the place where such person "was domiciled when the same was made, or by the laws "then in force in that part of Her Majesty's dominions "where he had his domicil of origin.

Sect. 2. "Every will and other testamentary instrument "made *within* the United Kingdom by any British subject "(whatever may be the domicil of such person at the time of "making the same, or at the time of his or her death) shall, "as regards personal estate, be held to be well executed, "and shall be admitted in England and Ireland to probate, "and in Scotland to confirmation, if the same be executed "according to the forms required by the laws for the time "being in force in that part of the United Kingdom where "the same is made.

Sect. 3. "No will or other testamentary instrument "shall be held to be revoked or to have become invalid, "nor shall the construction thereof be altered, by reason "of any subsequent change of domicil of the person making "the same.

Sect. 4. "Nothing in this Act contained shall invali- "date any will or other testamentary instrument, as "regards personal estate, which would have been valid if "this Act had not been passed, except as such will or "other testamentary instrument may be revoked or altered "by any subsequent will or testamentary instrument made "valid by this Act.

Sect. 5. "This Act shall extend only to wills and other

"testamentary instruments made by persons who die after "the passing of this Act." (*qq*).

In the same year was passed, on the 6th of August, another Act (24 & 25 Vict. c. 121), entitled "An Act to "amend the Law in relation to the Wills and Domicil of "British Subjects dying whilst resident abroad, and of "Foreign Subjects dying whilst resident within Her Majesty's Dominions." [It provided for conventions to be made with Foreign Countries under which British subjects residing abroad should retain their previous domicil, unless they took certain specified steps to obtain a foreign domicil, and further for conventions under which, if the British Consul were enabled to take possession of the effects of British subjects dying abroad, the foreign consul should have similar powers with regard to subjects of his nation dying in England (*r*). But no conventions of either kind appear to have been entered into.]

DCCCLXV. But a further question on the same point may arise. A testator makes his testament according to the Law of his actual domicil, [and afterwards removes to another place, where he remains domiciled till his death.] Must he make a new testament if the old one be not according to the form of the new domicil?

The jurisprudence of those states which consider the adoption of the form of the instrument as *facultative*, not *imperative*, ought, in consistency, to maintain that a will made according to the form of the *lex loci*, at the time of

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[(*qq*) This Act applies to naturalized British subjects (*In the Goods of Gally*, *L. R.* 1 *P. D.* p. 438); but not to British women who have married foreigners (*In the Goods of Von Buseck*, *L. R.* 6 *P. D.* p. 211, and s. c. on appeal as *Bloxam* v. *Favre*, *L.R.* 9 *P.D.* p. 130). It was decided by North J. that in sect. 2, personal estate included leaseholds. *In re Watson*, *Weekly Notes*, 1887, p. 142. For other decisions on the Act see *Pechell* v. *Hilderley*, *L. R.* 1 *Prob. & Mat.* p. 673. *In the Goods of Lacroix*, *L. R.* 2 *P. D.* p. 94.]

[(*r*) *Vide suprà*, vol. ii. § ccxlviii. note (*k*).]

its making, ought to be valid. Such is accordingly the doctrine laid down by Fœlix (*rr*).

Upon this point, Savigny (*s*) has the following passage:—"A more modern author (*t*) adds the following restriction:—The testament, he says, is valid "if the testator die in the foreign state. But if he "return to his own country the testament becomes "void, [at least in the case where a testament of this "kind is unknown in the Law of his own country.] I "do not think that this restriction is justifiable on "principle, and it seems to have obtained no approba-"tion from other jursts. Nevertheless, a prudent father "of a family would do well to make a new will on his "return home, in order to be secure against every possible "attack."

Story (*u*) considered it to be an undecided point, whether the *construction* of a will made under these circumstances would be governed by the law of the old or the new domicil. Yet he cites with approbation John Voet, as maintaining the invalidity of a will made before the change of domicil (*x*).

Since the death of Story, a Missouri court has decided that this opinion is the law (*y*).

(*rr*) Liv. ii. tit. ii. s. 77: "L'acte fait dans un pays étranger suivant les formes qui y sont prescrites, ne perd pas sa force, quant à sa forme, par le retour de l'individu au lieu de son domicile: aucune raison de droit ne milite en faveur de l'opinion contraire.

"Il en est de même en cas de changement de domicile des parties; ou de l'une d'elles, parce que la forme dépend de la loi du lieu de la confection de l'acte."

S. 117: "Le testament conserve sa validité quant à la forme, nonobstant le changement de domicile du testateur, parce que cette forme dépend de la loi du lieu de la confection de l'acte."

(*s*) *R. R.* viii. s. 381, IV.

(*t*) *Eichhorn, Deutsches Recht*, s. 37.

(*u*) *Conflict of Laws*, s. 479 *g*.

(*x*) *Ibid.* s. 473.

J. Voet, lib. xxviii. t. iii. s. 12, (tom. ii. p. 292.)

(*y*) *Nat* v. *Coon*, 10 *Missouri Rep.* p. 543.

But this doctrine is surely fraught with obvious and many inconveniences, and with the great evil of rendering difficult and uncertain that which it is one great object of civilization to render easy and certain—the validity of testaments (*z*).

DCCCLXVI. (3) As to the dispositions contained in the testament. Where no prohibitory laws of the State in which the *moveable* property is situate interfere, both by English Law, and by what may be fairly termed the general consent of jurists, the Law of the domicil of the testator governs the question of testamentary disposition, as that of the donor or transferor governs the question of transfers *inter vivos* (*a*). *Immoveable* property, as a general rule, is governed by the *lex rei sitæ* (*b*).

DCCCLXIX. (*c*) Quite consistently with these decisions the English Law holds, nevertheless, that a testament duly executed in a foreign state, according to the law of that state, by a testator domiciled therein, must be clothed with the authority of an English Court of Probate before it can affect moveable property in England; though the English court will adopt the Foreign law as conclusive on the subject of the validity of the testament (*d*).

DCCCLXX. (4) With respect to the construction and interpretation of testaments (*dd*), testamentary declarations, and the like, the English Law distinctly rules that

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(*z*) As to English law now, see s. 3 of 24 & 25 Vic. c. 114, *suprà*, § dccclxiv.A.

(*a*) *Story*, s. 472.

(*b*) *Ibid.* ss. 474–479, [and authorities therein cited. See *Blackwood* v. *The Queen*, *L. R.* 8 *Ap. Ca.* at p. 93.]

(*c*) § dccclxvii. is now inserted as § dccclxxii.A., and § dccclxviii. is omitted.]

(*d*) *Price* v. *Dewhurst*, 8 *Simons*, *Rep.* p. 279; [*Preston* v. *Lord Melville*, 8 *Clk. & Fin. Rep.* p. 1; *In the Goods of Bianchi*, 3 *Swab. & Trist. Rep.* p. 16; *In the Goods of Dost Aly Khan*, *L. R.* 6 *P. D.* p. 6. Cf. cases cited *suprà*, § dccclix. note (*ff*); and see *Story*, s. 513.]

[(*dd*) *Story*, ss. 479 *a*-479 *m*. *Vide suprà*, §§ dclxxix. *et seq.*]

the interpretation shall be governed by the Law of the domicil of the deceased person. The law upon this point was settled and expounded, and the distinction between this rule and the rule relating to the admissibility of evidence very clearly laid down, by Lord Brougham in a judgment of the House of Lords.

DCCCLXXI. "It is on all hands," he said, "admitted "that the whole distribution of Mr. Yates' personal estate "must be governed by the Law of England, where he "had his domicil through life, and at the time of his "decease, and at the dates of all the instruments executed "by him. Had he died intestate, the English statute of "distributions, and not the Scotch Law of succession in "moveables, would have regulated the whole course of "the administration. His written declarations must there-"fore be taken with respect to the English Law. I think "it follows from hence that those declarations of intention "touching that property must be construed as we should "construe them here by our principles of legal interpreta-"tion. Great embarrassment may, no doubt, arise from "calling upon a Scotch court to apply the principles of "English Law to such questions, many of those principles "being among the most nice and difficult known in our "jurisprudence. The Court of Session may, for example, "be required to decide whether an executory devise is "void, as being too remote; and to apply, for the purpose "of ascertaining that question, the criterion of the gift "passing, or not passing, what would be an estate in realty, "although in the language of the Scotch Law there is no "such expression as executory devise, and within the "knowledge of Scotch lawyers no such thing as an execu-"tory estate tail. Nevertheless, this is a difficulty which "must of necessity be grappled with, because in no other "way can the English law be applied to personal property "situated locally within the jurisdiction of the Scottish "forum; and the rule which requires the law of the "domicil to govern succession to such property could in

" no other way be applied and followed out. Nor am I " aware that any distinction in this respect has ever been " taken between testamentary succession and succession " *ab intestato*, or that it has been held either here or in " Scotland that the court's right to regard the foreign law " was excluded wherever a foreign instrument had been " executed. It is therefore my opinion that in this, as in " other cases of the like description, the Scotch court " must enquire of the foreign Law as a matter of fact, " and examine such evidence as will show how in England " such instruments would be dealt with as to construction. " I give this as my opinion upon principle, for I am not " aware of the question ever having received judicial de- " termination in either country.

" But here I think the importing of the foreign code " (sometimes incorrectly called the *Comitas*) must stop." . . . " Accordingly, where the question is what a person in- " tended by an instrument relating to the conveyance of " real estate situated in a foreign country, and where the " *lex loci rei sitæ* must govern, we decide upon his meaning " by that Law, and not by the Law of his country where " the deed was executed, because we consider him to have " had that foreign Law in his contemplation " (*e*).

DCCCLXXII. In accordance with the principle of this judgment, though long before it was delivered, the English courts have holden that a devise bad by the Law of the testator's domicil, though good by the Law of the state in which it is to take effect, is an invalid devise (*ee*).

DCCCLXXII.A. It would seem that even in the case of immoveable property, the Law of the domicil governs

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(*e*) *Yates* v. *Thomson*, 3 *Clk. & Fin. Rep.* pp. 585–588 (1835). See *Trappes* v. *Meredith*, *L. R.* 7 *Ch. App.* p. 248.

(*ee*) *Curtis* v. *Hutton*, 14 *Vesey*, *Rep.* p. 537 (*Sir W. Grant*)—a case under the Mortmain Act.

[See also *Philadelphia Baptist Association* v. *Smith*, 3 *Peters*, (*Sup. Ct.*) *Rep.* Appendix, pp. 500–503 ; *Story*, s. 479 *d*.]

the construction of the testamentary instrument, unless it clearly appears that the testator in the expressions which he used had in view the *lex loci rei sitæ* (*f*).

[In *Studd* v. *Cook* (*ff*) the point raised was the legal effect of a devise of Scotch heritage contained in an English will, and expressed in English legal terminology. The case came on appeal from the Scotch Court of Session to the House of Lords, where it was holden that effect must be given, so far as practicable, to the intention of the testator, as gathered from the whole context interpreted by English Law.]

DCCCLXXIII. So, as to ascertaining the particular class or description of persons entitled to take under a particular denomination or *designatio personarum*, the Law of the domicil is to govern, [whether the property be moveable or immoveable; unless, indeed, the context furnishes some clear guide for a different interpretation (*g*). The Law which would be applicable to duties or taxes payable upon a testamentary succession is referred to later on.]

DCCCLXXIII.A. (5) It has been holden in England that legacies and shares [of the estates of deceased persons] are payable according to the Law of the country, and in the *currency* of the country, in which the testator was domiciled; unless, indeed, the testament affords clear evidence that the testator contemplated another currency. Nor would this rule be varied [if the legacy had to be raised out of immoveable property] situate where the cur-

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(*f*) *Burge, Comm.* vol. ii. pp. 857, 858; *Story*, s. 479 *h*. *Trotter* v. *Trotter*, 3 *Wilson & Shaw, Rep.* p. 407; cf. *Bernal* v. *Bernal*, 3 *Mylne & Craig, Rep.* p. 559.

[(*ff*) *L. R.* 8 *App. Ca.* p. 577. See also *Bradford* v. *Young*, *L. R.* 29 *Ch. D.* p. 617, and cf. *Chamberlain* v. *Napier*, *L. R.* 15 *Ch. D.* p. 614; *Hernando* v. *Sawtell*, *L. R.* 27 *Ch. D.* p. 284.]

[(*g*) *Story*, ss. 479 *e*, 479 *m*, and cf. s. 484; *Harrison* v. *Nixon*, 9 *Peters*, (*Sup. Ct.*) *Rep.* p. 483.

Burge, Comm. vol. ii. p. 855; vol. iv. pp. 590-593.]

Rittson v. *Stordy*, 1 *Jur. N. S.* p. 771.

rency differs from that which prevails in the country of the testator's domicil (*gg*).

As to the *interest*, the English rule appears to be that legacies and shares carry interest according to the law of the country in which the assets have been placed by the executors or administrators since they became payable; the Law presuming that such interest has been earned (*h*).

DCCCLXXIV. [The third and last Question arises, as already mentioned, in] *Successions ab intestato* (*hh*). The points which may arise under this head are chiefly the following, (some of which, it will be seen, apply also to testamentary succession):—

What Law ought to decide—

(1) What persons are entitled to distribution?

(2) What portions of the estate of the deceased ought to be primarily chargeable with the payment of the debts of the deceased?

(3) The duties or taxes payable to the Government upon successions either testamentary or *ab intestato*?

DCCCLXXV. (1) The succession to *moveable* property is governed by the Law of the actual domicil of the intestate at the time of his death; and this Law decides who are the persons entitled to distribution; and in what degree of preference, if any, they are so entitled. This is the answer now given decidedly by the Law of England and of the United States (*i*). The same answer is given

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(*gg*) *Burge, Comm.* vol. iv. pp. 594–596; *Story*, s. 479 *b*, citing *Saunders* v. *Drake*, 2 *Atkyns, Rep.* p. 465; *Pierson* v. *Garnett*, 2 *Brown's Ch. Rep.* p. 39; *Malcolm* v. *Martin*, 3 *Ibid.* p. 50; *Wallis* v. *Brightwell*, 2 *Peere Williams, Rep.* p. 88.

(*h*) *Raymond* v. *Broadbelt*, 5 *Vesey, Rep.* p. 199; *Bourke* v. *Ricketts*, 10 *Vesey, Rep.* p. 330; *Westlake*, § 111.

(*hh*) *Story*, chap. xii.

Savigny, R. R. s. 375.

(*i*) *Story*, ss. 480–482 *a*.

Crispin v. *Doglioni*, 3 *Swab. & Trist. Rep.* p. 96; *Enohin* v. *Wylie*, 10 *H. L. Cases*, p. 1. [But see *Ewing* v. *Orr Ewing*, *L. R.* 10 *App. Ca.* at pp. 502-504: *Hamilton* v. *Dallas*, *L. R.* 1 *Ch. D.* p. 257.

In re Goodman's Trusts, *L. R.* 17 *Ch. D.* p. 266 (*suprà*, § dxli.A),

pretty generally by foreign jurists; it is, as they say, the *personal statute* which governs the case.

DCCCLXXVI. (*ii*) With respect, however, to *immoveable* property, the *lex sitûs* prevails: it governs both the *succession ab intestato* itself, and the description of persons who are to take under it. This is certainly the Law of England, and is in accordance with the opinion of some eminent foreign jurists (*j*). It [will be remembered], however, that with respect to *testaments* of immoveable property, the description of persons who are to take under some general designation is ascertained, according to English Law, by the *lex domicilii*, unless the context clearly furnishes a different interpretation (*k*).

DCCCLXXVII. (2) The Law of the domicil of the intestate ought also to decide whether particular *debts* are payable out of the personal or real estates (*l*), and what fund is primarily liable, and matters of the like kind. But it cannot be said that there is any uniformity of opinion among foreign jurists upon this point (*m*).

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decided that a child of parents domiciled abroad, illegitimate by English Law, but legitimated by the Law of the parents' domicil, was entitled to share as next of kin, under the Statute of Distributions, in the estate of an intestate who had died domiciled in England. *Andros* v. *Andros*, *L. R.* 24 *Ch. D.* p. 637. *In re Trufort*, *L. R.* 36 *Ch. D.* p. 600.]

[(*ii*) This section and the next are transposed in this edition.]

(*j*) [*Doe* d. *Birthwhistle* v. *Vardill*, 7 *Clk. & Fin. Rep.* p. 895.] *Story*, ss. 484, 484 *a*. [Cf. ss. 430 *et seq.*]

J. Voet, *ad Pand.* lib. xxxviii. t. xvii. s. 35.

(*k*) *Story*, s. 484. See also *Rittson* v. *Stordy*, 1 *Jur. N. S.* p. 771 (1855). [*Vide suprà*, § dcccIxxiii.]

(*l*) *Burge*, *Comm.* vol. iv. pp. 722–734.

Story, ss. 489 *c*, 528–529.

Anon. 9 *Modern Rep.* p. 66.

Winchelsea v. *Garretty*, 2 *Keen*, *Rep.* p. 293 (1837).

As to the *conflictus* on this point of Scotch and English Law, see *Brodie* v. *Barry*, 2 *Vesey & Beames*, *Rep.* p. 127; *Yates* v. *Thomson*, 3 *Clk. & Fin. Rep.* p. 544; *Anstruther* v. *Chalmer*, 2 *Simons Rep.* p. 1.

As to English and American Law—*Gordon* v. *Brown*, or *Brown* v. *Brown*, 3 *Haggard*, *Ecc. Rep.* p. 455, note; 4 *Wilson & Shaw's Rep.* 28.

(*m*) *Story*, ss. 489 *a* 489 *c*.

DCCCLXXIX. (*n*) (3) What Law ought to regulate the payment of duties to Government on successions?

[There is now chargeable in the United Kingdom, (in lieu of the former duties on Probates and Letters of Administration,) a stamp duty on the "Affidavit" as to the deceased's personal estate—in Scotland on the "Inventory"—required from the executor or administrator (*o*). The same duty is charged on personalty *given* within three months of the death of the deceased, and on voluntary settlements (*p*). These duties] are payable according to the *lex loci* of the assets at the death of the testator or intestate. [There are also duties] on legacies, and on shares [of the personal estates of testators or intestates (*q*); these latter duties] are payable according to the *lex domicilii* of the deceased, wherever the legatees [or persons entitled to the shares] may reside (*r*).

The Succession Duty Act, 1853 (16 & 17 Vic. c. 51), [imposes a duty on all successions to real estate, and on successions to personal estate] under settlements not included under the Legacy Duty Acts. It [was] a question much mooted, whether funds in England belonging to the estate of a deceased person who was domiciled abroad were, or were not, liable to duty under this Act (*s*). [But in the case of *In re Cigala's Settlement Trusts* (*t*), Anne Bacon,

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[(*n*) § dccclxxviii. is now § dccclxxiii. A.]

[(*o*) 44 Vic. c. 12, s. 27.

(*p*) *Ibid.* s. 38.

(*q*) 36 Geo. III. c. 52, and subsequent amending Acts.]

(*r*) *Thomson* v. *Advocate-Gen.* 12 *Clk. & Fin. Rep.* p. 1 (1845).

[*Skottowe* v. *Young*, *L. R.* 11 *Eq.* p. 474; *Blackwood* v. *The Queen*, *L. R.* 8 *App. Ca.* p. 82; see pp. 92, 93.

Atkinson v. *Anderson*, *L. R.* 21 *Ch. D.* p. 100.]

(*s*) *Wallace* v. *Attorney-General*, *Jeves* v. *Shadwell*, *L. R.* 1 *Ch. App.* p. 1; *Re Badart's Trusts*, *L. R.* 10 *Eq.* p. 288; *Attorney-General* v. *Campbell*, *L. R.* 5 *H. of L.* p. 524. *Lyall* v. *Lyall*, *L. R.* 15 *Eq.* p. 1.

For a curious case as to claiming legacy duty from a domiciled foreigner, see *Attorney-General* v. *Kent*, 1 *Hurlst. & Colt. Rep.* p. 12. *Vide supra*, § clxxxi.

[(*t*) *L. R.* 7 *Ch. D.* p. 351.]

an English lady, on her marriage with the Count de Cigala, a domiciled Italian, executed an ante-nuptial settlement, in English form, comprising *inter alia* French *Rentes*, and shares in the Bank of France. The Count and Countess lived and died in Italy, leaving two children (who were domiciled Italians) entitled to the funds in the settlement, which were then held by four English trustees. The children claimed to have the French funds free from succession duty in this country. It was holden by Jessel M.R. that "the settlement being a British settle-"ment, the trustees being subject to British jurisdiction, "the forum for deciding upon the claim being a British "Court," the funds, "being in fact English property," were "property" within the 2nd section of the Succession Duty Act, and the Crown was entitled to duty.]

CHAPTER XLIV.

ADMINISTRATION OF JUSTICE IN THE CASE OF FOREIGNERS —CIVIL LAW: 1. VOLUNTARY JURISDICTION—NOTARIES —COMMISSIONS—LITTERÆ REQUISITORIÆ—2. CONTENTIOUS JURISDICTION—FOREIGNER PLAINTIFF, DEFENDANT—ACTION BETWEEN TWO FOREIGNERS—LAW OF FOREIGN STATES EXCEPT FRANCE—FRENCH LAW—ENGLISH LAW.

DCCCLXXX. We have now to consider the Fourth Division (*a*) of this volume, which concerns the administration of justice in cases in which a foreigner is concerned. This administration may require, in the case of the foreigner, as of the subject, the application of the Civil, or the Criminal, Law. It seems most convenient to treat of the former category in the first instance.

DCCCLXXXI. The Civil Jurisdiction to which a foreigner may have recourse or be amenable is either—

1. Voluntary, or
2. Contentious.

1. The chief organ of the *Voluntary* jurisdiction is the Notary Public, who is, in fact, a kind of international officer, to the testimony of whose acts all civilized states give credit—an officer less known and more restricted in his powers in England (*aa*) than on the continent, (*b*) but

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[(*a*) *Vide suprà*, § xxx.]

(*aa*) See effect of notary's certificate in evidence, *Cole* v. *Sherard*, 11 *Exchequer Rep.* p. 482. See also *Re Elizabeth Hurst*, 15 *Com. Bench Rep.* p. 410 (1854); and *Re Clericetti*, *Ibid.* p. 762.

Phillimore's Eccles. Law, vol. ii. p. 1232.

Brooks on Notaries.

(*b*) The French *Code Civil*, art. 971-979, confers on notaries the exclusive power of making all testaments [that are not holograph.]

See, too, *Fœlix*, liv. ii. tit. iii. s. 228.

in England also a well-recognized and important functionary (*bb*). Much of the authority of the notary [has been conferred by Statute upon English consuls abroad (*c*).]

DCCCLXXXII. Under this head of voluntary jurisdiction, also, should be considered those requests which the tribunals or authorities of one state are, in the execution of justice, obliged to make to the tribunals or authorities of a foreign state, to permit or enforce the investigation of facts or the acquisition of evidence in the territory of that foreign state. A Commission generally issues for this purpose, which the French call *Commission Rogatoire* (*d*), a proceeding familiar to all acquainted with the proceedings of the civil, and especially the canon law. The Ordinary who required the testimony of a witness in the diocese of another Ordinary issued letters of request (*litteræ requisitoriæ* or *requisitoriales*) for that purpose.

DCCCLXXXIII. These commissions are almost invariably respected by foreign tribunals; the formula given by Denisart expresses the foundation of pure comity on which they rest: "Nous vous prions de . . . comme nous "ferions le semblable pour vous, si par vous nous étions "priés et requis" (*e*). [For a long time] England and the United States of America, instead of directing the commission to the foreign tribunals, [were] in the habit of entrusting their execution to certain of their own citizens, lawyers, magistrates, or consuls (*f*), as the case might be

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[(*bb*) Public Notaries in England are regulated by 41 Geo. III. c. 79; 3 & 4 Will. IV. c. 70; 6 & 7 Vic. c. 90.]

(*c*) 18 & 19 Vic. c. 42, [enabling British diplomatic and consular agents abroad to administer oaths and do notarial acts. See *Rules of the Supreme Court*, 1883, Order XXXVIII. r. 6. *Cooke* v. *Wilby*, *L. R.* 25 *Ch. D.* p. 769.]

(*d*) *Fœlix*, liv. ii. titre iv.

(*e*) *Denisart*, Commission, § iii. num. 3.

(*f*) See 15 & 16 Vic. c. 76, [C. L. P. Act, 1852] s. 23; 18 & 19 Vic. c. 42 [as to oaths administered abroad.]

—a mode of proceeding which rendered it optional on the part of witnesses whether they would give or withhold their testimony; but English judges have been empowered to issue commissions to judges [abroad, both within and without the British dominions (*g*).

By an Act passed in 1856, courts or judges in Her Majesty's dominions] are empowered to order the examination of witnesses here, in relation to any civil or commercial matter pending before any [competent] foreign tribunal (*h*).

DCCCLXXXIV. The English courts have ruled that a commission may issue to the judges of foreign courts, as individuals, to take the examination of witnesses, notwithstanding that the examination may not be conducted according to the law of England. Yet it would seem that if illegal evidence be returned, or if it appear either on the face of the return, or by extrinsic evidence, that the examination has been so conducted as to render it inadmissible, the whole or part may be rejected.

In a case in 1854, a former commission issued [to an English barrister at the instance of one of the parties] having proved abortive, in consequence of the foreign witnesses refusing to be examined by the English commissioner according to the English Law, the court, on granting to the same party a new commission to a foreign

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(*g*) [13 George III. c. 63, s. 44 as to India ;] 1 Will. IV. c. 22 [(partly repealed by 46 & 47 Vic. c. 49), 22 Vic. c. 20, and 48 & 49 Vic. c. 74 as to British dominions.]

3 & 4 Vic. c. 105, [s. 66 as to actions in Irish Courts.]

See *Clay* v. *Stephenson*, 3 *Adol. & El. Rep.* p. 807 (1835); *Ponsford* v. *O'Connor*, 5 *Mee. & Wel. Rep.* p. 673 (1839).

[But powers in this behalf are now exercised under *Rules of the Supreme Court* 1883, 1884, Order XXXVII. rr. 5, 6, 6A. Appendix K. Forms 36, 37, 37A, 37B.

A commission may be issued to a foreign court, *Re Boyse*, *L. R.* 20 *Ch. D.* p. 760.]

Taylor on Evidence (edit. 1885), §§ 508-517.

(*h*) 19 & 20 Vic. c. 113. [See 41 & 42 Vic. c. 67, s. 3.]

judge, imposed the payment of the costs of the former commission (*i*).

In the case of *Fischer* v. *Sztaray* (*k*) (heard before the Court of Queen's Bench, May 1858), a commission to examine witnesses, which had [at the instance of the defendant been] issued to the judges of a Hungarian court as individuals, was returned unexecuted; and an affidavit of the defendant's attorney stated that he was told by a secretary of the Austrian Legation in London that the commission ought to have been addressed to the court as a court, and not to individual judges.

Thereupon, the Queen's Bench ordered the commission to issue to the court as a court—the usual clause prescribing the form of oath to be omitted—the plaintiff having the opportunity, on the return of the commission, to object to the admissibility of the evidence taken under it; the costs of the abortive commission to be the plaintiff's costs in the cause, at all events.

DCCCLXXXV. It has been considered to be no answer to an application for a commission to examine witnesses abroad (supported by the ordinary affidavit), that the opposite party deposes that there are persons in this country, and documents accessible to the applicant, which would supply him with any information he could obtain from the witnesses he proposes to examine. And after a judge has exercised his discretion on such an application, the court will not disturb his decision unless it is manifestly wrong (*l*).

The court has ruled (*m*) that it will not permit a writ of subpœna *ad testificandum* to issue, to compel the attendance of a witness resident out of the jurisdiction, unless it be shown that the evidence cannot be had under a

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(*i*) *Lumley* v. *Gye*, 3 *El. & Bl. Rep.* p. 114.

(*k*) 31 *Law Times*, p. 130 [s. c. *nom. Fischer* v. *Izataray*, *Ell. Bl. & Ell. Rep.* p. 321].

(*l*) *Adams* v. *Corfield*, 28 *Law Journal*, *N. S.* (*Exch.*), p. 31.

(*m*) *Dunne* v. *Lewis*, 8 *Irish Common Law Reports*, Append. p. liv.

commission, or otherwise than by the personal attendance of the witness (*n*).

DCCCLXXXVI. 2. The first question which arises respecting the exercise of *Contentious* jurisdiction in a suit to which one, at least, of the parties is a foreigner, seems to be—What is the *forum competens* (*o*) in the particular case?

First, the answer may depend, in some degree, upon the position in the suit, so to speak, taken up by the foreigner. He may be (i) plaintiff (*demandeur*) or (ii) defendant (*défendeur*); and again, he may be (iii) plaintiff or defendant in a suit in which the other party is a native (*régnicole*); or a fellow-countryman; or a foreigner, and not his fellow-countryman.

Secondly, the answer may depend upon the nature or subject of the suit, whether it be an action *in rem*, or *in personam*—[local, or] transitory (*p*).

Thirdly, the answer may depend upon the accident of *place*, or, in other words, upon the place in which the obligation sought to be enforced was originally incurred, or in which it was agreed that it should be fulfilled—a consideration necessarily in some degree forestalled in an earlier chapter (*pp*). Thus jurists have said that the competence of a tribunal is to be determined—

[(*n*) As to examination of witnesses abroad, see *Steuart* v. *Gladstone*, *L. R.* 7 *Ch. D.* p. 394; *Re Boyse*, *Crofton* v. *Crofton*, *L. R.* 20 *Ch. D.* p. 760; *Armour* v. *Walker*, *L. R.* 25 *Ch. D.* p. 673; *Wilson* v. *Wilson*, *L. R.* 9 *P. D.* p. 8.]

(*o*) The preface to the Brazilian Code (ed. 1857, p. xxiv, note 1) well observes, that *actiones* are, in their true and primary sense, *jus persequendi*; in their derived and secondary sense, *medium persequendi*.

(*p*) [In England, since the Judicature Act of 1875, there is but little distinction between local and transitory actions. R. S. C. order XXXVI. r. 1, enacts that "there shall be no local venue for the trial "of any action except where otherwise provided by statute." Vide *infrà*, § dcccxcvi.]

(*pp*) Chap. xxxv.

α. Ratione domicilii.
β. Ratione contractûs.
γ. Ratione destinatæ solutionis.
δ. Ratione dominationis.

In the following sections the effect of these different categories will be considered.

DCCCLXXXVII. In every civilized state the plaintiff foreigner is allowed to bring his suit against the native (*q*). This permission, which rests upon the clearest principle of national justice, may be and is more or less hampered, in certain states, with difficulties in its practical working (*r*); but in the abstract it is universally recognized.

The *Code Civil* of France expressly incorporates this principle into its provisions, and it also extends the permission by making the naturalized foreigner amenable in the same manner as the native (*s*); and judicial interpretation has carried the principle a step further by placing also the stranger who has been admitted to "establish his "domicil" in France in the same category, for this purpose, as the native (*t*).

This is the law of France in cases where there is no reciprocity in the Law of the state of the foreigner. Those states which have modelled their codes upon that of France have adopted this provision.

DCCCLXXXVIII. The [Constitution] of the United States of America confers on particular tribunals the cognizance of cases between an alien and a citizen, [and between resident] citizens of different States. These tribunals are

(*q*) *Fœlix*, liv. ii. t. ii. ss. 128 et seq.

(*r*) See Demangeat's note to *Fœlix* (ed. 1856), tome i. p. 259.

(*s*) Even where the obligation has been contracted abroad and previously to his naturalization. *Fœlix*, s. 129; *Cour de Cassation*, March 27, 1833; *Gaz. des Trib.* April 10, 1833. [See *Code Civil*, Arts. 11-16.]

(*t*) So decided by the *Cour de Cassation* in a case of *séparation de corps*, July 25, 1855. *Dev. Car.* lvi. i. 148: Demangeat's note to *Fœlix*, s. 129.

[See *Massé, Droit Comm.* liv. ii. tit. ii. ch. i. sect. iii. Nos. 647 et seq.]

the *Federal Courts* (*tt*). [In the cases just mentioned] it is the character of the parties (*ratio personarum*), and not the nature of the suit, which founds the jurisdiction of these tribunals (*u*). The jurisdiction is confined to cases between citizens and foreigners, or citizens of different states, and does not extend to suits between alien and alien (*uu*).

DCCCLXXXVIII.A. It has been holden in the English courts that a foreign court may settle the conditions on which it will exercise its jurisdiction; those conditions being fulfilled, it may exercise that jurisdiction, but the judgment given in such circumstances cannot claim extra-territorial authority unless pronounced in accordance with the rules of International and public Law (*x*).

DCCCLXXXIX. The tendency of modern European jurisprudence is to open to the foreigner the ordinary courts of justice of the country. The consular jurisdictions, in unchristian states, form a partial exception to this otherwise general rule (*y*).

[(*tt*) The Federal Courts are the Supreme Court, the Circuit Courts, and the District Courts. The jurisdiction of the Federal Courts extends "to all cases in law and equity arising under the Constitution, the laws, and treaties of the Union; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; to controversies between a State, *when plaintiff*" (Amendment No. XI. of the Constitution), "and citizens of another State, or foreign citizens or subjects; to controversies between citizens of different States, and between citizens of the same State claiming lands under grants of different States; and between a State, or citizens thereof, and foreign states; and between citizens and foreigners." *Kent, Comm.* vol. i. pp. 295, 298, 301, 303, 306. (Lecture xiv.)]

(*u*) *Ibid.* p. 343. (Lecture xvi.)

Cf. the institution of the *Recuperatores*. *Antè*, vol. i. § xxvi.

[(*uu*) *Kent, Comm.* vol. i. p. 344.]

(*x*) *Shaw* v. *Gould* (1868), *L. R.* 3 *H. L. Cases*, p. 55.

[*Infrà*, chapter xlvi.]

(*y*) *Massé, Droit Comm.* liv. ii. tit. i. ch. iii. sect. iv. Nos. 474 et seq.

[*Antè*, vol. i. chap. xix.; vol. ii. chap. v.]

DCCCXC. Though the plaintiff foreigner be thus allowed to bring his suit, he is, by the laws of all states, compelled to give bail (*fournir caution*) for costs and damages (*z*). The French Law admits two exceptions to the general rule; viz.—

i. Cases in which matters of commerce or trade are concerned (*a*).

ii. Cases in which the plaintiff foreigner possesses, in France, immoveable property, of value sufficient to cover the costs and damages (*aa*).

iii. To these must, of course, be added cases in which, by the specific provisions of a treaty, foreigners are exempted from the necessity of finding bail.

iv. An exception must also be made in the case of a stranger who acts as a plaintiff ministerially under the authority of a court of justice (*b*). With some modification, the principle above mentioned is incorporated into all codes founded upon the *Code Civil* of France (*c*).

DCCCXCI. We have next to consider the case of the foreigner as *defendant* (*d*) in a suit. Here, again, the Roman Law furnishes the maxim which lies at the root of all international and of most domestic jurisprudence on this matter; that maxim is *actor sequitur forum rei.* The English Law allows, in personal actions, no exception from this rule: wherever the defendant is, there the plaintiff may sue him. It is true, that to this proposition is generally

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(*z*) The Novella cxii. c. ii. of Justinian probably furnishes the origin of this practice and policy: it is entitled "*De cautione quæ ante reorum citationem præstari debet ab actore.*" It may, however, as Demangeat thinks, have sprung, independently of the Roman Law, from old Teutonic usages.

(*a*) *Code Civil*, art. 16.
Code de Procédure Civile, arts. 166, 423.

[(*aa*) *Code Civil*, art. 16.
Code de Proc. Civ. art. 167.]

(*b*) *Id est*, if he be "porteur d'un titre paré." *Fœlix*, s. 140.

(*c*) *Fœlix*, s. 128.

(*d*) Cf. *Fœlix*, ss. 167-208.

added by writers the qualification, that the defendant should be domiciled in order to found the competency of the tribunal; but not domiciled in the strict sense of the term, *animo et facto*, with intention of permanent residence; domiciled in the sense of commorant appears to be all that the English Law requires.

DCCCXCI.A. Upon the question whether an action at law be maintainable by parties clothed with a title from Foreign Law, it has been decided in England that a woman who has become by the laws of France personally liable for her husband's debts, and has paid them after his death, and who is by the same laws entitled to sue in her own right to recover back the money so paid, has a *primâ facie* right to bring such action in this country without first taking out administration here. She is entitled to the like privilege as donee by the laws of France of her deceased husband's rights of action (*e*).

DCCCXCII. We have considered generally the principles of Law applicable to the foreigner as plaintiff, and as defendant. In this consideration it has, however, been assumed that the other party to the suit was a native subject, or a person entitled to be holden as such for the purposes of the suit. But what are the principles of Law applicable to a suit in which *both parties* are *foreigners*? The answer would not appear to be difficult—namely, the same principles which are applicable to two subjects. Foreigners, who are admitted to reside or be commorant within the limits of a state, and permitted to contract obligations, *juris gentium*, with each other, cannot be denied the right, equally *juris gentium*, of resorting to the courts of justice of the country for the purpose of enforcing the fulfilment of such obligations. It is but a half measure of justice, as Massé (*f*) observes, to permit the

(*e*) *Vanquelin* v. *Bouard*, 12 *W. R.* p. 128 ; [33 *L. J. C. P.* p. 78. *Worms* v. *De Valdor*, 49 *L. J. Ch.* p. 261.] *Vide infrà*, § dccccxxvii.A.

(*f*) *Droit Comm.* liv. ii. tit. ii. ch. i. sect. iii. num. 657. [Referring to *Code Civil*, arts. 13, 14.]

foreigner to sue a subject, and to refuse him justice in the case of another foreigner.

In the existing state of societies, all obligations *juris gentium* borrow something from the Municipal Law: "Ex "hoc jure gentium . . commercium, emptiones, vendi- "tiones, locationes, conductiones, obligationes institutæ; "exceptis quibusdam quæ a jure civili introductæ sunt" (*g*), is the language of the Digest. All civilized nations but France act towards foreigners upon the principles contained in this passage. Even those who maintain that foreigners *inter se* are confined in a foreign state to the power of entering into obligations or making contracts *juris gentium* only, must admit that there must be some means of compelling their fulfilment, or of affording redress for their non-fulfilment; for to permit such obligations to be entered into is tacitly at least to treat them as legal, and, if legal, capable of enforcement; or otherwise the foreigner must be permitted to do justice for himself, and to seek as he best can in natural law that redress which the civil law denies to him (*h*). He cannot be altogether *exlex*.

DCCCXCIII. The doctrine stated in the preceding paragraph is adopted by the jurisprudence of every civilized state but one; that one, most strange to say, which in its general jurisprudence may fairly claim pre-eminence over other modern nations—France. That state, acting upon a caricature of the true principle of national independence, holds that it has no civil jurisdiction over foreigners, and that to exercise it would be an infringement on the rights of independent states.

The French tribunals, therefore, at present hold themselves *incompetent* to entertain suits relating to *personalty* between undomiciled foreigners; except, indeed, in matters of commerce (*i*).

(*g*) *Dig.* lib. i. t. i. 5.

(*h*) *Massé, ubi sup.*

Fœlix, s. 146.

(*i*) *Massé, ibid.* num. 652: "Quant aux actions personnelles et

This extraordinary departure, no less from the duty of a state towards all who are commorant within its boundaries than from the principles of international comity, has provoked, not unnaturally perhaps, measures of *retorsion* (*k*) in various states—as in Austria, Prussia, Bavaria, and Wurtemberg (*kk*).

The best accredited French jurists (*l*) regret and condemn this law, which has been made by the decisions of courts, and, as these jurists contend, on a misapplication or misinterpretation of the true principles of jurisprudence.

It is, perhaps, in consequence of these opinions that the more modern decisions in France have shown a tendency to distinguish between contracts made abroad, and contracts made in France, between two foreigners; and an inclination in the latter case to maintain the competency of the French tribunals (*m*).

The exception, founded on article 420 of the *Code de Procédure*, in favour of commercial matters, and the decisions establishing this exception, do, in fact, condemn the rule. The language of the *Cour de Cassation* establishing this exception is remarkable: "Qu'il s'agit d'un acte

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mobilières la tendance générale de la jurisprudence actuelle est de n'admettre la compétence des tribunaux français entre étrangers, d'une manière absolue, qu'en matière commerciale. En matière civile, et même pour les engagements passés en France, une jurisprudence *qui, il est vrai, tend aujourd'hui à se modifier*, a longtemps exigé, pour que les tribunaux français soient compétents, que l'un des étrangers au moins fût autorisé à établir son domicile en France et y jouisse des droits civils."

(*k*) See *antè*, vol. iii. § viii.

[(*kk*) *Massé, ibid.* num. 657.]

(*l*) *Massé, ibid.* Nos. 653 et seq.

Fœlix, s. 146: "Quant aux réclamations qu'un étranger peut avoir à exercer contre un autre étranger, le droit français diffère de celui de presque tous les autres pays civilisés. . . . Cette jurisprudence . . . nous semble contraire au droit des gens Européen."

See also s. 157.

(*m*) See note (*a*) by Demangeat to *Fœlix*, s. 151 (tome i. p. 293).

" de commerce, conséquemment d'un *contrat du droit des* " *gens*, soumis, dans son exécution, aux lois et aux tri- " bunaux du pays où il a eu lieu." As if the " droit des " gens " was not equally applicable to all contracts entered into between strangers within the territory of the state. How much more liberal and just is the opinion of Pothier, who, speaking of the community of goods between married persons, observes : " Lorsque des étrangers, " quoique non naturalisés, mais domiciliés en France, " sous une coutume qui admet la communauté de biens, " sans qu'il soit besoin de la stipuler, y contractent " mariage, sans passer aucun contrat de mariage, la com- " munauté légale a lieu entre ces personnes. Il est vrai " que ces personnes ne sont pas capables du droit civil, " qui n'a été établi que pour les citoyens, tel que le droit " des testamens, des successions, du retrait lignager ; " mais elles sont capables de ce qui appartient au droit des " gens, telles que sont toutes les conventions. Or, la com- " munauté légale n'est fondée que sur une convention, que " les personnes qui contractent mariage sont présumées " avoir eue d'établir entre elles une communauté, telle " que la loi de leur domicile l'établit . . . de laquelle con- " vention, de même que de toutes les autres conventions, " les étrangers sont capables. La communauté légale peut " donc avoir lieu entre ces personnes ; à plus forte raison " la conventionnelle " (*n*).

Questions of *status* (*état*) between foreigners, the French courts decline to entertain also, on the ground that they relate to matters of public order of a foreign country (*o*). The French Courts have also considered themselves incompetent to entertain a suit for separation on behalf of a foreign wife ; but, according to later

(*n*) *Pothier, Traité de la Communauté*, partie i. chap. i. art. i.

(*o*) *Fœlix*, s. 158.

See the English statute, 21 & 22 Vic. c. 93, ["An Act to enable persons to establish Legitimacy and the Validity of Marriages, and the Right to be deemed natural born subjects."]

decisions, it would seem that such a suit on the part of the wife will now be entertained by them when the defendant is a foreigner ["admitted by the authorization of the "President of the Republic] to establish his domicil" in France, and the defendant can only avoid their jurisdiction by proving *in limine litis* that he is domiciled in a foreign state. Demangeat observes that the court ought to go further, and entertain suits of this kind between foreigners merely resident (*simplement résidant*) in France, inasmuch as these cases concern the public order of the state in which they reside (*p*).

The French courts also consider themselves incompetent to adjudicate upon questions of nullity of marriages between two foreigners (*q*), and upon other matters of the like kind. They have also refused to adjudicate on succession to the moveable property (*purement mobilière*) of an undomiciled foreigner dying in France (*r*).

DCCCXCIV. The kingdom of Belgium has adopted the French practice upon this point. Holland, Prussia, and some other German states are more liberal, and open the tribunals of justice to two foreigners as to two natives.

DCCCXCV. England exactly reverses the practice of France in this matter; and, in admitting one foreigner to sue another for the breach of an obligation contracted *abroad*, goes beyond the most liberal aspirations of the French jurists (*s*). The practice of England must be stated at some length.

DCCCXCVI. And, first, with respect to Common Law Actions. [These have been classed as being] "either *local* "or *transitory*; the former being founded on such causes "of action as necessarily refer to some particular locality, "as in the case of trespasses to land; the latter on such

(*p*) *Fœlix*, s. 158; note by Demangeat.

(*q*) *Ibid.* [See *Journal du Droit Internat. Privé*, vol. xvi. p. 459.]

(*r*) *Vide suprà*, chap. xxvi. as to what constitutes *moveable* property.

(*s*) See, however, *Matthæi* v. *Galitzin*, *L. R.* 18 *Eq.* p. 340; [*Reiner* v. *Marquis of Salisbury*, *L. R.* 2 *Ch. D.* p. 378.]

" causes of action as may be supposed to take place any-
" where, as in the case of trespasses to goods, batteries,
" and the like. [Thus real actions are always in their
" nature local—personal actions are for the most part
" transitory. The former, as the general rule, must
" formerly have been tried always in the county where
" the cause of action really arose, and by a jury of that
" county; the latter might be tried in any county, at the
" discretion (in general) of the plaintiff. And it follows
" from this, that in respect of a trespass on land out of
" the jurisdiction no action would lie in an English
" court. On the other hand, where the action is tran-
" sitory (as in the case of a contract wherever made), such
" action will lie in the English courts, whether the
" breach be committed in England or elsewhere"] (*t*).

DCCCXCVI.A. In the case of *Lord Seymour* v. *Scott* (*u*) it was holden by the Court of Exchequer Chamber that an action would lie in the English Courts for damages in respect of an assault committed by one Englishman upon another at Naples, if by the law in force at Naples the injured person might recover damages or compensation for such an assault; and further, that the fact that criminal proceedings, not proceedings to recover damages, were pending before two Courts at Naples was no bar to an action in England, even though by the Neapolitan law the right to recover damages was suspended till the criminal proceedings were ended. This latter rule was holden to be a mere matter of procedure, part of the *lex fori*.

DCCCXCVII. Secondly, with respect to the *form of writ of summons* against a defendant, resident out of the jurisdiction, and not being a British subject. The Common Law Procedure Act, 1852, [gave] a form of writ in

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(*t*) *Stephen's Comm.* vol. iii. [p. 376 (ed. 1883). *Vide suprà*, § dcccl.xxxvi. note (*p*).]

(*u*) 8 *Jur. N. S.* p. 568; 9 *ib.* p. 522; 1 *Hurlst. & Colt, Rep.* p. 219. [*Westlake*, § 319. Cf. cases cited in *The Christiansborg, L. R.* 10 *P. D.* p. 141; and *Mutrie* v. *Binney, L. R.* 35 *Ch. D.* p. 614.]

this case (*x*). [But the matter is now regulated by the Rules of the Supreme Court, 1883, Order XI. of which enumerates the circumstances in which service, out of the jurisdiction, of a writ of summons, or notice of a writ of summons, may be allowed (*y*). The same Order prescribes

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(*x*) Section 19 [(repealed now by 46 & 47 Vic. c. 49)] of 15 & 16 Vic. c. 76. [See *Padley* v. *Camphausen*, *L. R.* 10 *Ch. D.* p. 550.]

[(*y*) R. S. C. 1883, Order XI. Rule 1. "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever—

(a) The whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits); or

(b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

(c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(d) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or

(e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

(f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

Rule 2 refers to Scotland and Ireland, and Rule 3 provides, with no qualification, that in Probate actions service out of the jurisdiction may be allowed by leave of the Court or a Judge.

See *Re Eager*, *L. R.* 22 *Ch. D.* p. 86; *Re Busfield*, *L. R.* 32 *Ch. D.* p. 123; *Hewitson* v. *Milner*, *L. R.* 21 *Q. B. D.* p. 8. *Ex pte. Jellard*, *L. R.* 39 *Ch. D.* p. 424.

As to service on Foreign Corporations see] *Newby* v. *Van Oppen*, *L. R.* 7 *Q. B.* p. 293; [*Westman* v. *Aktiebolaget Snickarefabrik*, *L. R.* 1 *Ex. D.* p. 240; *Nutter* v. *Messageries*, 1 *Times Rep.* p. 644.]

Vide suprà, § ccii.

that "when the defendant is neither a British subject, "nor in British dominions, notice of the writ, and not the "writ itself, is to be served upon him" (*z*). Permission to thus serve a writ, or notice of a writ, will not be granted by the Courts as a matter of course, especially where both parties are foreigners (*a*).]

DCCCXCVIII. Thirdly, with respect to *security for costs*. [The Rules of the Supreme Court now provide that where security for costs is required, the amount of such security, and the time, manner, and form of giving it, shall be as the Court or a Judge shall direct; and further that "a plaintiff ordinarily resident out of the jurisdiction "may be ordered to give security for costs, though he "may be temporarily resident within the jurisdiction" (*b*)].

DCCCC. (*c*) From analogy to the course adopted where the plaintiff is resident out of the jurisdiction, the Courts of Equity have, upon application, restrained an ambassador's servant, whose person is privileged from arrest by the 7 Ann. c. 12, from proceeding with his suit until he had given security for costs (*d*).

DCCCCI. All states are agreed, France included, that

[(*z*) *Ibid.* rule 6. See also Appendix A, part I. Forms No. 5 to No. 10; Order II. rule 4.

(*a*) *Société Générale de Paris* v. *Dreyfus Brothers*, *L. R.* 37 *Ch. D.* p. 215. It was observed in the judgment (at p. 226), with reference to costs, that "when one foreigner sues another in the courts of this country on a foreign contract, he is making a very hazardous experiment in asking for leave to serve the defendant, a foreigner, out of the jurisdiction."

New Chile &c. v. *Blanco*, 4 *Times Rep.* p. 346.]

[(*b*) R. S. C. Order LXV. rules 6, 6A. See *Wilson*, *Practice of the S. C. J.* in loc. (ed. 1888, pp. 478-481).

(*c*) § dcccxcix. is omitted, as it refers to the former practice of the Court of Chancery before it was incorporated into the High Court of Justice.]

(*d*) *Vide antè*, vol. ii. § clxxxix.

Anon. Mosely, *Rep.* p. 175.

Goodwin v. *Archer*, 2 *P. Williams*, *Rep.* p. 452.

Adderley v. *Smith*, 1 *Dickens*, *Rep.* p. 355.

it is competent to them to exercise jurisdiction over foreigners in the matter of immoveable property (*immeubles purement réelles ou mixtes*) situated within the territory (*e*). According to French Law, the question as to the immoveable property must be the principal question, and not an accessory (*f*).

Judgment obtained in the state of the domicil of two foreigners may be put in force by aid of the French courts to affect moveable property in France (*g*).

Provisional measures (*h*) (*mesures conservatrices ou provisoires*), having for their object to secure the safety of person or property of foreigners, are within the competence of the French courts (*i*).

So if the necessity of adjudicating upon a civil matter between foreigners arises out of a *criminal* matter (*matière criminelle, correctionnelle de police*), it is within the competence of the French tribunal (*k*).

DCCCCII. The High Court of Admiralty in England, being a court of International Law, treated as within its jurisdiction the case of a foreign ship, upon which an *obligatio ex delicto* attached from an act done to another foreign ship in foreign waters; the circumstance of the arrest within English waters having been holden sufficient to found the jurisdiction (*l*); [and the High Court of Justice would now do the same].

DCCCCIII. The peculiar *status* of *ambassadors*, their exterritorial privileges and immunities from the civil and

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(*e*) *Fœlix*, s. 160.

(*f*) *Ibid.*

(*g*) *Ib.* s. 161.

(*h*) The absence of any such general power in the English courts is much to be lamented, though, to a certain extent, it will be seen that the end is attained by the process of Injunction, [and by the appointment of Receivers].

(*i*) *Fœlix*, 162.

(*k*) *Ib.* s. 165.

(*l*) See *The Mali Ivo, L. R.* 2 *Adm.* p. 356.

criminal law of the state in which they represent the person of a foreign sovereign, have been fully discussed in a former volume of this work (*m*); and the same may be said of the privileges of foreign sovereigns and governments, both as to suing and being sued (*n*).

(*m*) Vol. ii. part vi. ch. vii. viii.
(*n*) Vol. ii. part vi. ch. i.

CHAPTER XLV.

LAW GOVERNING PROCEDURE AND EVIDENCE—LEX FORI—DOCUMENTARY EVIDENCE—PROOF OF FOREIGN OFFICIAL ACTS AND OF FOREIGN LAW—ORAL EVIDENCE—ORDINATORIA ET DECISORIA.

DCCCCIV. It ought to be a canon of Private International Law that, wherever a foreign tribunal is rightly seised of a cause, and is in the exercise of a lawful jurisdiction, the mode of proof and the rules of evidence which that tribunal adopts should not be questionable before any other *forum*. It is a consequence of the well-established rule of comity, "de his quæ pertinent *ad litis ordinationem* "inspicitur locus judicii" (*a*). An exception to this canon might, no doubt, be furnished by a case in which the plain rules of natural justice have been violated; but such an exception it is hardly safe to contemplate, and no practical rule can be built upon it (*b*).

DCCCCIV.A. The English courts hold that all questions of *procedure* are to be determined by the *lex fori*, and, I think, would include the question of "set-off" in this category (*c*).

DCCCCV. But when the jurisdiction of a tribunal is duly founded, a question may arise as to what proof it ought to receive as sufficient with respect to an act done in a foreign state. Is it the proof which the foreign state

(*a*) *Vide suprà*, citation from *Bartolus*. Note on Chap. xvi.

(*b*) *Fœlix*, ii. s. 369; *Bar*, § 117, "Die Parteien: ihre Stellvertreter und Beistände."

(*c*) *Macfarlane* v. *Norris*, 2 *Best & Smith*, *Rep.* p. 783 (1862).

would deem sufficient? or that which the technical rules of the *forum* which has cognizance of the cause require?

It may be worth while to consider some principles generally admitted by jurists upon this subject.

DCCCCVI. Every code of Laws, ancient and modern, the Roman Law, the Canon Law, the Codes of modern states, have admitted the following various classes of proof (*d*):—

α. The proof by a written instrument (*preuve littérale*).

β. The proof by witnesses (*preuve testimoniale*).

γ. The proof by the oath of the party to the suit.

δ. The proof by presumption (*par présomption*).

ε. The particular kind of proof afforded in matters of commerce by the account books of persons engaged in trade (*livres des commerçants*), which is, perhaps, strictly speaking, a branch of the first division, already mentioned.

DCCCCVII. With respect to the *proof by a written instrument* (*preuve littérale*), this species of proof is generally admitted by all civilized states. If, therefore, a question arises before the tribunal of one state, in which an instrument written in another state is produced as evidence, it is never rejected because such a kind of evidence is inadmissible, though the external form of the instrument and the solemnities relating to it may be made the subject of examination. But before this examination can be instituted, or the written instrument received as evidence, a burden lies upon the party producing it to show that the instrument has been executed in [the place, the law of which is sought to be applied].

By what means this burden of proof shall be discharged is a question for the *lex fori* to decide.

"The peculiar rules of evidence," Mr. Taylor observes, "adopted in one country, whether established by the prac-"tice of its courts, or enacted by the legislature for the

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(*d*) *Fœlix*, ss. 224, 225. [*Pardessus, Droit Comm.* num. 1486.]

"government of those courts,—cannot be permitted to "regulate the proceedings of courts in another country, "when transactions, which took place in the former "country, become the subject of investigation in the "latter (*e*). The law of evidence is the *lex fori* which "governs the courts. Whether a witness is competent "or not, whether a certain matter requires to be proved "by writing or not, whether certain evidence proves a "certain fact or not—these, and the like questions, must be "determined, not *lege loci contractûs*, but by the law of the "country where the question arises, where the remedy is "sought to be enforced, and where the court sits to enforce "it (*f*). The case of *Clark* v. *Mullick*, which was decided "before the law was altered by the Evidence Amendment "Act of 1851 (*g*), affords a striking example of this rule. "There, the assignees of a bankrupt under an English "fiat having brought an action in Calcutta against a "debtor of the bankrupt, and the pleas having put in "issue the bankruptcy and the assignment, it was held that "the affirmative of these issues could not be proved by "producing copies of the proceedings in the Bankruptcy "Court, purporting to bear the seal of that court, and to "be signed by the clerk of enrolments; for, although, by "the statutes relating to bankruptcy, such evidence was "sufficient in English courts of justice, it was not at that "time admissible in India, as the Acts did not extend to "that country (*h*). Again, although, by the Scotch Law, "all instruments prepared and witnessed according to the "provisions of the Act of 1681 are probative writs, and "may be given in evidence without any proof, yet still, if "it were required to prove one of these Scotch instruments

(*e*) *Clark* v. *Mullick*, 3 *Moore, P. C. Rep.* at p. 279, per Lord Brougham.

(*f*) *Bain* v. *Whitehaven and Furness Junc. Rail. Co.* 3 *H. L. C.* p. 19, per Lord Brougham.

(*g*) 14 & 15 Vic. c. 99, ss. 11, 19.

(*h*) *Clark* v. *Mullick*, 3 *Moore, P. C. Rep.* pp. 252, 280.

" in an English court, its mere production would not " suffice, but it would be necessary to call one or other of " the attesting witnesses (*i*).

" The case of *Brown* v. *Thornton* (*k*) is another illustra- " tion of this rule. There, a charter-party had been " entered into at Batavia; and, in accordance with the " Dutch Law, which prevails in that colony, the contract had " been written in the book of a notary, and a copy, signed " and sealed by him and countersigned by the Governor " of Java, had been delivered to each of the parties. In " the courts of Java the contract is proved by producing " the notary's book; but in all other Dutch courts the " copies are received as due evidence of the original. " Under these circumstances, the plaintiff in an English " court tendered his copy of the charter-party as evidence " of the contract, but the court held that it was inadmis- " sible, on the ground that English judges could not adopt " a rule of evidence from foreign courts.

" Several other cases could be cited to the same " effect (*l*); and in all the distinction is recognized between " the *cause of action*, which must be judged of according " to the Law of the country where it originated, and the " *mode of proceeding*, including, of course, the rules of " evidence, which must be adopted as it happens to exist " in the country where the action is brought " (*m*).

(*i*) *Yates* v. *Thomson*, 3 *Clk. & Fin. Rep.* pp. 577, 580, *et seq.*, per Lord Brougham.

(*k*) 6 *Adol. & El. Rep.* p. 185.

(*l*) *Trimbey* v. *Vignier*, 1 *Bingham, N. C.* p. 151; *Huber* v. *Steiner*, 2 *Bing. N. C.* p. 202; *British Linen Co.* v. *Drummond*, 10 *Barn. & C. Rep.* p. 903; *Appleton* v. *Lord Braybrook*, 2 *Stark. Rep.* p. 6; s.c. 6 *M. & Sel. Rep.* p. 34; *Black* v. *Lord Braybrook*, 2 *Stark. Rep.* p. 7; s.c. 6 *M. & Sel. Rep.* p. 39; *Don* v. *Lippmann*, 5 *Clk. & Fin. Rep.* pp. 1, 13–17; *Leroux* v. *Brown*, 12 *C. B. Rep.* p. 801; *Finlay* v. *Finlay*, 31 *L. J. Prob. & Mat.* p. 149.

(*m*) *Smith's Leading Cases*, vol. i., *Mostyn* v. *Fabrigas*, and notes thereon. See, also, *Story, Conflict of Laws*, ss. 556 *et seq.* and 629–636.

Taylor's Law of Evidence, vol. i. pp. 68, 69 (ed. 1885).

DCCCCVIII. The proof, in England and Ireland, of foreign judgments and acts of state has been greatly facilitated by a statute, passed in 1851, which enacts that "All proclamations, treaties, and other acts of state of "any foreign state, or of any British colony, and all "judgments, decrees, orders, and other judicial proceed- "ings of any court of justice in any foreign state, or in "any British colony, and all affidavits, pleadings, and other "legal documents filed or deposited in any such court, "may be proved in any court of justice, or before any "person having by law, or by consent of parties, authority "to hear, receive, and examine evidence, either by ex- "amined copies or by copies authenticated as hereinafter "mentioned; that is to say, if the document sought to be "proved be a proclamation, treaty, or other act of state, "the authenticated copy to be admissible in evidence must "purport to be sealed with the seal of the foreign state "or British colony to which the original document be- "longs; and if the document sought to be proved be a "judgment, decree, order, or other judicial proceeding of "any foreign or colonial court, or an affidavit, pleading, "or other legal document filed or deposited in any such "court, the authenticated copy to be admissible in evi- "dence must purport either to be sealed with the seal of "the foreign or colonial court to which the original docu- "ment belongs, or, in the event of such court having no "seal, to be signed by the judge, or if there be more than "one judge, by any one of the judges of the said court; "and such judge shall attach to his signature a statement "in writing on the said copy that the court whereof he is "a judge has no seal; but if any of the aforesaid authen- "ticated copies shall purport to be sealed or signed as "hereinbefore respectively directed, the same shall respect- "ively be admitted in evidence in every case in which "the original document could have been received in evi- "dence, without any proof of the seal where a seal is "necessary, or of the signature, or of the truth of the

" statement attached thereto, where such signature and " statement are necessary, or of the judicial character of " the person appearing to have made such signature and " statement " (*n*).

[DCCCCVIII.A. By Article IV., Section 1, of the Constitution of the United States of America it is ordained that:—

" Full faith and credit shall be given in each State to " the public acts, records, and judicial proceedings of every " other State. And the Congress may by general laws " prescribe the manner in which such acts, records, and " proceedings shall be proved, and the effect thereof."]

DCCCCIX. Upon the principle contained in the preceding sections, the *lex fori* must always decide what kind of proof it will require of the existence and the meaning of a foreign law. The English rule upon this subject, stated generally (*o*), is that it must be proved by calling as a witness a foreign advocate or jurist, or one who is *peritus virtute officii* in the knowledge of that foreign Law; and this must be done in each case, because it is possible that the [foreign law] may have changed since it was proved in a former case, however recent (*p*).

In the case of *Dalrymple* v. *Dalrymple*, nevertheless, Lord Stowell said: " The authorities to which I shall have " occasion to refer are of three classes: first, the opinions " of learned professors given in the present or similar " cases; secondly, the opinions of eminent writers as de- " livered in books of great legal credit and weight; and " thirdly, the certified adjudication of the tribunals of " Scotland upon these subjects. I need not say that the

(*n*) 14 & 15 Vic. c. 99, s. 7.

[See also 22 & 23 Vic. c. 63, " An Act to afford facilities for the " more certain ascertainment of the law administered in one part " of Her Majesty's dominions, when pleaded in the courts of another " part thereof."]

(*o*) *Taylor on Evidence*, part iii. chap. iii. s. 1423 (edit. 1885).

(*p*) *M'Cormick* v. *Garnett*, 5 *De Gex McNaghten & Gordon*, *Rep.* p. 278 (1854).

"last class stands highest in point of authority; where "private opinions, whether in books or writing, incline on "one side, and public decisions on the other, it will be the "undoubted duty of the court, which has to weigh them, "*stare decisis*" (*q*).

And in *Bremer* v. *Freeman* (1857) the Judicial Committee of the Privy Council held itself at liberty to form an opinion on the articles cited from the *Code Napoléon* (*r*).

[In *Bradlaugh* v. *De Rin* (*rr*) the French *Code de Commerce* having been considered by agreement of the parties as in evidence, the Court held that it was at liberty to consult French commentaries to assist it to put a proper construction on the Code.]

DCCCCX. The English *lex fori* requires that the witness who is to prove foreign law shall be either a legal person or in an official situation, which requires for the due execution of its duties a competent knowledge of that Law; but with respect to a foreign *usage* or *custom*, any witness acquainted with the fact would probably be considered competent (*s*).

The certificate of the [Russian] Ambassador in this country was admitted as evidence of the law of [Russia] as to the validity of a testamentary instrument (*t*).

In a case where the opinion of a Scotch advocate was in evidence, an English Court of Equity, considering that there was implied therein an opinion on a question of Scotch law raised in the suit, decided the question on that evidence (*u*).

DCCCCXI. With respect to the effect of books kept by

(*q*) *Dalrymple* v. *Dalrymple*, 2 *Haggard, Consistory Rep.* at p. 81.

(*r*) 10 *Moore, P. C. Rep.* p. 306; and see *Sussex Peerage Case*, 11 *Clk. & Fin. Rep.* pp. 114–117; *Nelson* v. *Bridport*, 8 *Beav. Rep.* p. 527.

[(*rr*) *L. R.* 5 *C. P.* p. 473.]

(*s*) *Sussex Peerage Case*, 11 *Clk. & Fin. Rep.* at p. 124.

[*Bristowe* v. *Sequeville*, 5 *Exch. Rep.* p. 275.]

Taylor on Evidence, ss. 48, 1425 (edit. 1885).

(*t*) [*In the Goods of Prince Oldenburg*, *L. R.* 9 *P. D.* p. 234, following] *In the Goods of Klingemann*, 3 *Swab. & Trist. Rep.* p. 18.

(*u*) *Macdonald* v. *Macdonald*, 41 *L. J.* (*Chanc.*), p. 566 (1873).

commercial persons as furnishing evidence, Savigny (*x*) adopts the opinion of the Supreme Court of Appeal of Cassel, namely, that the Law of the place where the books are kept should decide as to their admissibility and credibility as evidence. He admits that, inasmuch as this kind of proof belongs to the Law of procedure, it ought, properly speaking, to be governed by the Law of the *forum*, which exercises jurisdiction over the matter; but in this case the proof is inseparably bound up with the form and efficacy of the transaction itself. The foreigner who deals with a trader whose establishment is in a state, the law of which admits the books of the trader as evidence, subjects himself voluntarily to that law (*xx*).

DCCCCXII. The proposition, that a written instrument cannot be impugned upon grounds which are not authorized by the *lex loci* where it was made, is followed, according to Fœlix, by the necessary consequence that no proof can be admitted in a foreign state relative to the validity of that instrument, other than that which would have been admitted by the *lex loci* of the state in which it was made. Thus, in France it is not permitted to adduce proof by witnesses to impugn the contents of a written instrument, or to prove what was said before or after its execution; and, therefore, if an instrument executed in France were to be the subject of litigation in another state—Prussia, for instance—where a contrary rule prevails, and where such oral testimony is admissible, it ought, nevertheless, not to be admitted in the case of an instrument executed in France (*y*). This point will presently be further considered in the discussion on Oral evidence.

DCCCCXIII. When the place of execution is once determined, the law of that place ought to govern both the question of the external formalities, and the question of

(*x*) *R. R.* viii. s. 381, III.

[(*xx*) See some important questions as to admissibility of evidence discussed in *The Lauderdale Peerage Case*, *L. R.* 10 *App. Ca.* p. 692.]

(*y*) *Fœlix*, s. 227.

the authenticity of the act or instrument: "il est du droit "des gens," the authors of the *Nouveau Denisart* say, "que ce qui est authentique dans un pays le soit chez "toutes les nations" (*z*). The importance of this proposition derives illustration from the great difference which exists in the laws of States, both relatively to the persons charged, as public officers, such as notaries or tabellions, with the execution of contracts, testaments, and the like instruments, and also relatively to the degree of faith which shall be given to their acts (*a*).

DCCCCXIV. In accordance with the principle which has been stated, an English court has holden, that an erasure in a foreign affidavit occurring in the recital of a death, the certificate of which was proved as an exhibit, was immaterial, notwithstanding that the notary, before whom the affidavit was sworn, had not affixed his initials to the erasure; and, in the same case, it being proved that in verifying the mark of a marksman in an affidavit sworn [at New York it was not the practice], as in this country, to require the notary to insert in the *jurat* that "the witness saw the deponent make his mark,"—it was holden that the omission of these words was immaterial (*b*).

DCCCCXV. With respect to *Oral proof by witnesses* (*c*)

(*z*) *Fœlix*, s. 226.

(*a*) *Ibid.* s. 228.

(*b*) *Savage* v. *Hutchinson* (*V.-C. Wood*, 1855), 24 *L. J. N. S.* (*Ch.*) p. 232. *Wharton, Conflict of Laws*, §§ 752, et seq.

(*c*) For the Roman law on Documentary evidence see *Dig.* lib. xxii. t. iv., *Cod.* iv. 21, "De fide instrumentorum et amissione eorum." *Instrumenta* in its general sense included every kind of proof—oral as well as documentary; but in its more usual sense documentary proof only. It would appear from a curious passage in *Aulus Gellius* that the Roman judge did not confine the party to any particular kind of proof, or insist in any case upon documentary proof alone. A. Gellius sat as a judge in an action for money had and received, but the plaintiff "neque *tabulis* neque *testibus* id factum docebat;" the defendant insisted, and it would appear legally, that evidence on the character of the parties could not be taken, "clamitabat probari apud me debere pecuniam datam consuetis modis, *expensi latione*, *mensæ rationibus*,

(*preuve testimoniale*), very material differences exist in the practice and laws of different States upon this subject. It may frequently happen that a party to a suit loses his cause in one state on account of the inadmissibility of evidence before the tribunals of that state which would have been admitted, and by its admission have secured his success, before the tribunals of another state. Upon the hypothesis that each *forum* must exclusively enforce its own rules of evidence, it requires but a slight acquaintance with the laws and practice relative to evidence in England, France, Germany, and Spain, to be aware how often it must be of vital consequence to the suitor to ascertain before what tribunal his suit will be instituted. It is, in truth, of the utmost importance that a general rule of comity should prevail with respect to what law should govern the admissibility of evidence relative to an act done abroad. There are two well-established categories under which jurists rank all matters relating to forensic proceedings, namely, *ea quæ litis formam concernunt ac ordinationem*, and *ea quæ spectant decisoria causæ et litis decisionem.* Under which of these two categories the admissibility of evidence should be placed, is perhaps the most embarrassing question which can be found within the range of Private International Law.

DCCCCXVI. The reasoning of Rocco (*d*) on this subject deserves more attention than it appears to have received. He adopts the division into the *ordinatoria* and the *decisoria litis*, and argues that the admissibility or inadmissibility of a certain mode of proof, the consideration whether that should or should not be allowed to be established by oral testimony, are matters which have no small effect upon the *decision* of a cause, inasmuch as it often happens that a fact or proposition can only be judicially

chirographi exhibitione, tabularum obsignatione, testium intercessione, ex quibus si nullâ re probaretur, dimitti jam se oportere, et adversarium de calumniâ damnari."—*A. Gellius*, lib. xiv. c. ii.

(*d*) Lib. iii. cap. xi. p. 363.

established by the species of proof which is refused. On the other hand, the ascertainment of the particular manner and form in which the testimony should be given—for instance, whether it should be given in the presence of one party or of both, whether openly or secretly—relates entirely to the order of procedure.

It is, he afterwards observes, a firm and settled principle of international jurisprudence that rights duly acquired in one state should not be subject to defeasance in another state. But if the foreign magistrate, whose aid is sought for the enforcement of an obligation, may reject the species of proof, which the parties had before their eyes at the time when they contracted the obligation, rights duly acquired in one state may not only be altered but annihilated in another state. A party to the obligation naturally contemplated, at the time of its being entered into, the mode of proof allowed by the *lex loci contractûs* as capable of being adduced to elucidate any obscurity in the terms of the obligation itself. He provided himself with no other proof: if that should turn out to be the only proof by which the obligation can be sustained, and that be rejected by the foreign tribunals, the obligation itself is partially overthrown. Therefore, Rocco says, the foreign tribunal, which has to enforce the contract, ought not to reject a species of evidence which the Law of the place of the contract would have admitted.

DCCCCXVII. Fœlix is clearly of opinion, and is supported by the highest French judicial authorities, that the *lex loci contractûs*, and not the *lex fori*, ought to decide the question of the admissibility of oral evidence to sustain or impeach the obligation; inasmuch as the question relates to the "*fond* de la contestation," and not to the "*formes* "*de procéder*" (*e*).

Fœlix cites Story (*f*) and Burge (*g*) as exponents of the

(*e*) *Fœlix*, s. 233.
(*f*) *Conflict of Laws*, s. 629.
(*g*) *Comm.* vol. i. p. 29.

English practice, and as agreeing with him in this position —with what justice we will now proceed to consider.

DCCCCXVIII. The English tribunals, and those of the United States of America, have been much embarrassed (*h*) by the extreme practical difficulty of distinguishing between cases in which the admission of evidence affects the substance and merits of the cause, and those in which it can be considered as solely a matter of procedure.

Thus, for the construction and interpretation of written foreign instruments, it seems to be established that the evidence *legis loci contractûs* must be received: what such evidence is must be proved, like all foreign law, as a matter of fact: but the questions as to the competency of witnesses —as to whether a certain matter can be proved by written or oral testimony—as to what is the force of certain evidence, whether it proves or not a certain fact—are questions belonging to the *lex fori*; and the usual formulary is, that the admission and the rules of evidence belong to the *ordinatoria litis*, and are governed *lege fori*, and not *lege domicilii* or *lege loci contractûs* (*hh*).

DCCCCXIX. "The cases," Lord Justice-Clerk Hope (*i*) observed, "must be rare indeed in which the court of one "country can be called upon to administer justice accord- "ing to the law of evidence or prescriptions obtaining in "another country, when no question is raised as to the "forms (*k*) and requisites of the written instruments or "writs, or exemplification of documents of another country. ". . . I am not aware that there is any case in which "the courts of one country have admitted that they could "be called upon to govern their enquiries into a *matter of* "*fact* by the law of evidence of another country."

DCCCCXX. In the following extracts from three suc-

(*h*) *Story*, s. 637: "This most embarrassing and as yet (in a great measure) unsettled class of questions."

[(*hh*) Cf. *suprà*, § dcxciv.A.]

(*i*) *Robertson* v. *Burdekin*, *Ross*, *Leading Ca.* vol. i. at p. 818.

(*k*) Cf. *Story*, s. 260 *a*, and note.

cessive judgments of the House of Lords, it will be seen how the vigorous mind of Lord Brougham applied itself to this difficult question, and the steps by which the formulary or maxim above mentioned became incorporated into English jurisprudence.

In *Yates* v. *Thomson* (*l*), a case in which a question arose in Scotland upon the *interpretation* of a will made in England, Lord Brougham, as we have seen (*m*), held that the testator's written declarations must be taken with respect to the English Law; and that it followed from this proposition that those declarations of intention touching that property were to be construed as they would be construed by English principles of interpretation. But that there the importing of the foreign code must stop. "What evidence," he added, "the courts of another "country would receive, and what reject, is a question "into which I cannot at all see the necessity of the courts "of any one country entering. Those principles which "regulate the admission of evidence are the rules by which "the courts of every country guide themselves in all their "enquiries. The truth with respect to men's actions, "which form the subject-matter of their enquiry, is to be "ascertained according to a certain definite course of "proceeding; and certain rules have established, that in "pursuing this investigation some things shall be heard "from witnesses, others not listened to; some instruments "shall be inspected by the judge, others kept from his "eye. This must evidently be the same course, and "governed by the same rules, whatever be the subject-"matter of investigation; nor can it make any difference, "whether the facts concerning which the discussion arises "happened at home or abroad; whether they related to "a foreigner domiciled abroad, or a native living and "dying at home. As well might it be contended that "another mode of trial should be adopted, as that another

(*l*) 3 *Clk. & Fin. Rep.* pp. 585-591. (*m*) *Vide suprà*, § dccclxxi.

"law of evidence should be admitted in such cases. Who "would argue that, in a question like the present, the "Court of Session should try the point of fact by a jury "according to the English procedure, or should follow the "course of our dispositions or interrogatories in courts of "equity, because the testator was a domiciled Englishman, "and because those methods of trial would be applied to "his case were the question raised here? The answer is, "that the question arises in the Court of Session, and "must be dealt with by the rules which regulate enquiry "there. Now, the law of evidence is among the chief of "these rules; nor let it be said that there is any incon-"sistency in applying the English rules of construction "and the Scotch ones of evidence to the same matter, in "investigating facts by one law and intention by another. "The difference is manifest between the two enquiries; "for a person's meaning can only be gathered from "assuming that he intended to use words in the sense "affixed to them by the law of the country he belonged "to at the time of framing his instrument. Accordingly, "where the question is, what a person intended by an "instrument relating to the conveyance of real estate "situated in a foreign country, and where the *lex loci rei "sitæ* must govern, we decide upon his meaning by that "law, and not by the law of the country where the deed "was executed, because we consider him to have had that "foreign law in his contemplation. The will of April, "1828, has not been admitted to probate here; it has not "even been offered for proof, so that there is no sentence "of any court of competent jurisdiction upon it either way. "But in England it would never be received in evidence, "nor seen by any court; neither would it have been seen if "it had been proved ever so formally. Our law holds the "probate as the only evidence of a will of personalty, or "of the appointment of executors; in short, of any dis-"position which a testator may make, unless it regards "his real estate. Can it be said that the Scotch Court is

"bound by this rule of evidence, which, though founded "upon views of convenience, and, for anything I know, "well devised, is yet one which must be allowed to be "exceedingly technical, and which would exclude from "the view of the court a subsequent will, clearly revoking "the one admitted to probate? The English courts "would never look at this will, although proof might be "tendered that it had come to the knowledge of the party "on the eve of the trial. A delay might be granted to "enable him to obtain a revocation of the probate of the "former will. It is absurd to contend that the Court of "Session shall admit all this technicality of procedure "into its course of judicature as often as a question arises "upon the succession of a person domiciled in England. "Again, there are certain rules just as strict, and many "of them not less technical, governing the admission of "parol evidence with us. Can it be contended that, as "often as an English succession comes in question before "the Scotch Court, witnesses are to be admitted or re-"jected upon the practice of the English Courts? nay, "that examination and cross-examination are to proceed "upon those rules of our practice, supposing them to be "(as they may possibly be) quite different from the Scotch "rules? This would be manifestly a source of such in-"convenience as no court ever could get over. Among "other embarrassments equally inextricable there would "be this: that a host of English lawyers must always be "in attendance on the Scotch Courts, ready to give "evidence, at a moment's notice, of what the English "rules of practice are touching the reception or refusal "of testimony, and the manner of obtaining it; for those "questions which, by the supposition, are questions of "mere fact in the Scotch Courts, must arise unexpectedly "during each trial, and must be disposed of on the spot, "in order that the trial may proceed. The case which I "should, however, put, as quite decisive of this matter, "comes nearer than any other to the one at bar; and it

"may with equal advantage to the elucidation of the "argument, be put as arising both in an English and "in a Scotch Court. By our English rules of evidence "no instrument proves itself unless it be thirty years old, "or is an office copy, authorized by law to be given by the "proper officer, or is the London Gazette, or is by some "special act made evidence, or is an original record of a "court under its seal, or an exemplification under seal, "which is *quasi* a record. By the Scotch Law all instru- "ments prepared and witnessed according to the pro- "visions of the Act of 1681 are probative writs, and may "be given in evidence without any proof. Now, suppose "a will of personalty, or any other instrument relating to "personal property, attested by two witnesses, and executed "in England, according to the provisions of the Scotch "Act, is tendered in evidence before the Court of Session; "it surely never will be contended that the learned judges, "on being satisfied that the question relates to English "personal succession, ought straightway to examine what "is the English law of evidence, and to require the atten- "dance of one or other of the subscribing witnesses, where "the instrument is admissible by the Scotch Law as proba- "tive? Of this I can have no doubt. But suppose the "question to arise in England, and that a deed is executed "in Scotland according to the Act of 1681, by one domi- "ciled here, would any court here receive it as proving "itself, being only a year old, without calling the attest- "ing witnesses? It would have a strange effect to hear "the circumstance of there being two subscribing witnesses "to the instrument, which makes it prove itself in the "Parliament House of Edinburgh, urged in Westminster "Hall as the ground of its admission without any parol "testimony. The court would inevitably answer, 'Two "'witnesses: then, because there are witnesses, it cannot "'be admitted but they must, one or other of them, be "'called to prove it.' The very thing that makes the instru- "ment prove itself in Scotland makes it in England neces-

"sary to be proved by witnesses. I have, therefore, no "doubt whatever that the rules of evidence form no part of "the foreign law, according to which you are to proceed in "disposing of English questions arising in Scotch Courts."

DCCCCXXI. In the leading case of *Don* v. *Lippmann* (*n*), Lord Brougham said:—

"No one will contend, in terms, that the foreign rules of "evidence should guide us in such cases; and yet it is not "so easy to avoid that principle in practice, if you once "admit that, though the remedy is to be enforced in one "country, it is to be enforced according to the laws which "govern another country. Look to the rules of evidence, "for example. In Scotland some instruments are probative; "in England, until after the lapse of thirty years, they do "not prove themselves. In some countries forty years are "required for such a purpose; in others, thirty are sufficient. "How, then, is the law to be ascertained which is to govern "the particular case? In one court there must be a previous "issue of fact; in another there need be no such issue. In "the latter, then, the case must be given up as a question "of evidence. Then come to the law. The question "whether a parol agreement is to be given up, or can be "enforced, must be tried by the law of the country in which "the law is set in motion to enforce the agreement. Again, "whether payment is to be presumed or not must depend "on the law of that country, and so must all questions of the "admissibility of evidence; and that clearly brings us home "to the question on the Statute of Limitations. Until the act "of Lord Tenterden, a parol agreement or promise was suffi-"cient to take the case out of the Statute of Limitations; "but that has never been the case in Scotland. It is not con-"tended here that the practice of England is applicable to "Scotland; but these are illustrations of the inconvenience "of applying one set of rules of law to an instrument "which is to be enforced by a law of a different kind" (*o*).

(*n*) 5 *Clk. & Fin. Rep.* p. 15.
(*o*) See *Story*, s. 635 *b* et seq.

DCCCCXXII. The same high authority has judicially pronounced that, as to the stipulations of a contract made abroad, "our courts are bound by foreign law, which must "to them be matter of fact. But it is a totally different "thing as to the law of evidence. The law of evidence is "the *lex fori* which governs the courts. Whether a wit- "ness is competent or not; whether a certain matter "requires to be proved by writing or not; whether certain "evidence proves a certain fact or not; that is to be deter- "mined by the law of the country where the question "arises, where the remedy is sought to be enforced, and "where the court sits to enforce it" (*p*).

DCCCCXXIII. Nevertheless, with respect to the title to *real* property, it has been holden that if an enrolled and recorded copy has, *lege situs*, the same force as the original, such copy is itself a conveyance, and that an examined copy is receivable in England, without evidence of search for the original, because it is not regarded as a copy of a copy, but as being made from a duplicate original (*q*). It is, perhaps, difficult to reconcile the principle of this decision with that of Lord Brougham in the matter of personal property above mentioned.

DCCCCXXIV. Story (*r*) says that, with regard to Wills of *personal* property made in a foreign state, it seems to be almost a matter of necessity to admit the same evidence to establish their validity abroad as would suffice for this purpose in the domicil of the testator; otherwise the favourite doctrine *mobilia sequuntur personam* would be practically overthrown; and therefore parol evidence has been admitted to prove the manner in which the testament is made and proved in the place of the testator's domicil, in order to lay a foundation for the establishment of the testament else-

(*p*) *Bain* v. *Whitehaven & Furness Junc. Rail. Co.*, 3 *House of Lords Cases*, at p. 19.

(*q*) *Tulloch* v. *Hartley*, 1 *Younge & Coll. Chancery Rep.* p. 114.

(*r*) *Conflict of Laws*, s. 636.—*De Sobry* v. *De Laistre*, 2 *Harris & Johnson*, (*Maryland*) *Rep.* pp. 191-195.

where. Still the reader must bear in mind the observations of Lord Brougham in *Yates* v. *Thomson*.

[DCCCCXXIV.A. The question whether a foreign document not bearing the stamp required by its own Law could be received in evidence in England, was raised in *Bristowe* v. *Sequeville* (*rr*); in which case it was decided that if by the law of a foreign country a document is only inadmissible in evidence for want of a stamp, it is a valid contract, and receivable in evidence in another country, but "if for "want of a stamp a contract made in a foreign country is "*void*, it cannot be enforced here."]

DCCCCXXV. Upon the important question whether the *lex fori* or the *lex loci contractûs* ought to govern in cases where Prescription or a Statute of Limitation is pleaded or relied upon, the reader is referred to what has been said in the chapter on the Discharge of Obligations (*s*).

DCCCCXXVI. The *priorities* and *privileges* of creditors, in the marshalling and distribution of assets, are considered by Story (*t*), who founds his opinion on a passage from Rodenburgh, as matters relating to the forms and order of proceedings, and as therefore ruled by the *lex fori*. This operation appears, however, to be subject to some qualifications (*u*).

DCCCCXXVII. The question as to the time within which an *appeal* must be instituted is clearly among the *ordinatoria litis*, and determinable by the *lex fori* (*x*).

[(*rr*) 5 *Exch. Rep.* p. 275 (A.D. 1850). The law was less clear in the earlier cases, viz.: *Alves* v. *Hodgson*, 7 *Term Rep.* p. 241; *Clegg* v. *Levy*, 3 *Camp. Rep.* p. 166; *James* v. *Catherwood*, 3 *Dowl. & Ry.* p. 190; *Wynne* v. *Jackson*, 2 *Russ. Rep.* p. 351. As to Bills of Exchange *vide suprà*, § dcccxliii.

See cases discussed in *Westlake*, § 199 (edit. 1880).

Wharton, Conflict of Laws, chap. x. §§ 685-688.]

(*s*) Chap. xl. §§ dccci-dcccviii.

(*t*) *Confl. of L.* s. 423*b*; cf. *Cook* v. *Greyson*, 2 *Drewry, Rep.* p. 286.

(*u*) As to *liens* on property depending on the *lex sitûs*, *vide suprà*, § dcclxii.; as to cases of *Bankruptcy*, § dcclxv. et seq.; and as to *Stoppage in transitu*, § dcccxxx. et seq.

(*x*) *Tulloch* v. *Hartley*, 1 *Younge & Coll. Chancery Rep.* p. 114.

DCCCCXXVII.A. The question whether a foreign suitor have or have not in a particular suit a legal *persona standi in judicio* ought, I think, to be determined by reference to the law of his own country (*y*). But it is doubtful whether such would be the ruling of an English court (*z*).

A case came before an English court in which the question was whether a husband and wife, who had carried on trade as partners in Spain, could sue as such in our courts. It was ruled that they could not, nor maintain a joint action against persons resident in this country, to recover the amount of a balance due to the partnership account, without proof being given that by the law of Spain a *feme covert* is permitted to trade; and it is doubtful whether an action could be maintained by both, even on such proof being given (*a*).

DCCCCXXVII.B. In the case of the *Halley*, a Norwegian barque was run down in Belgian waters by an English steamship, which was afterwards arrested at the suit of the owners of the Norwegian vessel by process out of the High Court of Admiralty of England. The defendants, the owners of the steamship, pleaded that by the Belgian or Dutch laws in force at the place of the collision their ship was compelled to take on board, and be navigated by, a pilot; that she was being navigated by a pilot; and that the collision occurred by his fault. The plaintiffs replied that by the same

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(*y*) Cf. *Bar*, § 117. [See *Lodge* v. *Phelps*, 1 *Johnson's Cases*, p. 139, and afterwards 2 *Caines' Cases in Error*, p. 321, cited *Ross*, *Leading Cases*, vol. i. p. 877.]

[(*z*) Cf. *Bullock* v. *Caird*, *L. R.* 10 *Q. B.* p. 276, where it was a question whether a member of a Scotch firm could be sued alone in England on a Scotch contract.]

(*a*) *Cosio & Pineyro* v. *De Bernales*, 1 *C. & P.* p. 266; *Ryan & Moody*, p. 102, per Abbott, C. J. *Sed vide suprà*, § dcccxci.A.

According to Mr. Wharton, the question whether an assignee can sue in his own name or not is sometimes technical, sometimes essential —in the former case the *lex fori* would prevail. See his *Conflict of Laws*, § 735, and note (*x*).

Bar considers the question apparently in the same light; § 117.

laws the owners of the wrongly navigated ship were still liable for the damage, notwithstanding that it was attributable to the pilot. This reply was objected to, and it was contended that the law of the place of the commission of the *delict* did not apply, and that the case was governed by the *lex fori*, i.e. by the English law, which makes such a defence as that set up in this case a good one. The Court of Admiralty held the reply good and overruled the objection; but on appeal the Privy Council reversed this decision (*b*).

But with regard to this case and the English decisions on pilotage generally, it should be noticed that in the case of the *China* the Supreme Court of the United States of America held that a compulsion by local law (that of the State of New York) to take on board and be navigated by a pilot does *not* free the vessel from liability to a maritime lien for a collision occasioned by her wrongful navigation, though under the orders of the pilot (*c*).

(*b*) *L. R.* 2 *Adm.* p. 3; 2 *P. C.* p. 193. *Vide supra*, § dcccxv.A.
(*c*) 7 *Wallace* (*Sup. Ct. U. S. A.*) *Rep.* p. 53.

CHAPTER XLVI.

FOREIGN JUDGMENTS.

DCCCCXXVIII. In this chapter it is proposed to consider the effect, both which ought to be and which is, given by the tribunals of one State to judgments delivered by the tribunals of another State; that is, the practice of Comity respecting *Foreign Judgments* (*a*). The subject, regarded from an English point of view, would have been properly treated, in the former chapter, under the category of evidence; but regarded more generally, and with reference to foreign jurisprudence, it seems to require a separate and distinct consideration.

(*a*) *Donelli*, *Comm.* lib. xxii. c. v. De exceptione rei judicatæ, quibus, adversos quos, quâ de re, competat.

Fœlix, s. 319.

Klüber (*Europäisches Völkerrecht*, § 59) considers that a foreign judgment ought to be executed by other States on the ground of its being a convention between the parties, or an arbitration submitted to by them.

Pinheiro Ferreira treats it as the result of a tacit contract on the part of the foreigner, to be bound by the law of the State in which he resides. *Notes sur Vattel*, p. 303.

Massé, *Droit Comm.* liv. ii. tit. ii. num. 800, is also of this opinion —*quasi contrahitur in judicio.*

Generally on the *exceptio rei judicatæ*, cf. *Savigny*, *R. R.* v. ss. 216, 231, 235, 249; vi. ss. 281, 295.

Merlin, *Rép.* Jugement, VI. VII. bis, VIII. *Q. de Dr.* Jugement, XIV.

Pothier, *Tr. des Obl.* partie iv. c. iii. s. 3, nos. 851 et seq.

Bar, § 125. Das Endurtheil, seine verbindliche Kraft und Vollstreckung.

Wharton, chapter x.

[*Smith*, *Leading Cases*, vol. ii., Notes to *Duchess of Kingston's Case* (pp. 868 et seq. Edit. 1887).

Foreign Judgments, by F. T. Pigott. Edit. 1884.]

DCCCCXXIX. The authority of a judgment in time of peace is derived exclusively from the civil law of the territory in which it is given; it cannot, therefore, according to strict principles of international Law, have effect or operation in a foreign territory. But international Comity, "*usu exigente et humanis necessitatibus*," speaks another language, and a foreign judgment is generally, in some shape or other, and with more or less restriction, upholden and executed by all states.

DCCCCXXX. Both from the jurisprudence and the positive enactments of states upon this subject, the general axiom may be deduced—that no state allows a foreign judgment to be executed within its territory, except under the authority and by the order of its own tribunal. But the practice of states is various upon this subordinate point—namely, whether the foreign judgment shall be executed at the simple request of a party (*simple demande ou requête*) or the formal requisition (*commission rogatoire*) of the foreign tribunal; or whether the permission to execute it shall be delayed until the domestic tribunal has examined, more or less, the grounds upon which the foreign tribunal founded its decision (*b*).

DCCCCXXXI. It follows, from the principles laid down in the early part of this volume, that no state will recognize or allow to be executed a foreign judgment which contains any provisions or order contrary to the public morals or public policy of the realm in which execution of it is sought (*c*). The French tribunals have furnished a strong illustration of this principle; the *Cour de Paris* having decided [at a time when divorce was not allowed in France] that it was unlawful to permit the execution in France of a Swiss judgment of divorce be-

(*b*) *Pardessus*, t. iv. No. 1488.
Revue Etrangère, t. iii. p. 127, &c. (*Aubry*).
Fœlix, s. 320.
(*c*) *Vide suprà*, § xviii.
[*Rousillon* v. *Rousillon*, *L. R.* 14 *Ch. D.* p. 351.]

tween Swiss parties, although the execution was only requested to enforce the payment of costs awarded against one of the parties, and although by a treaty between (*d*) France and Switzerland it was expressly provided that definitive judgments in civil causes should, after they had been legalized by the competent authority, be executed in France (*e*).

DCCCCXXXII. It seems a clear proposition of reason and Law that the foreign judgment when recognized must be interpreted and considered, as to its effects, according to the Law of the state in which it was pronounced; Savigny and Fœlix are in complete accordance upon this not unimportant point (*f*).

DCCCCXXXIII. In order to understand the reasoning of foreign jurists on this subject, it is necessary to bear in mind the distinction between two effects ascribable to a foreign judgment.

i. It may be pleaded as an *exceptio rei judicatæ*, or, as it is said in England, a plea in bar.

ii. It may be given effect to and *executed* in the same manner as a domestic judgment (*g*).

DCCCCXXXIV. The great majority of states (*h*) give

(*d*) July 18, 1828, [later treaty June 15, 1863; *Décret*, Oct. 19, 1869. *Roger et Sorel, Lois Usuelles*, edit. 1888, p. 1120.]

(*e*) *Fœlix*, s. 321, note *a*.

(*f*) *Savigny, R. R.* viii. s. 373, B.

Fœlix, s. 324.

(*g*) "De tout ce qui précède, il résulte que les jugements étrangers, alors même qu'ils n'ont pas été déclarés exécutoires par un tribunal français, font foi, jusqu'à preuve contraire, des faits qu'ils énoncent ou qu'ils constatent, et qu'ils ont l'autorité de la chose jugée."—*Massé*, liv. ii. tit. ii. num. 800 *in fine*.

See, too, *Martens*, liv. iii. § 94: he says, when—1, the tribunal is competent; 2, the foreigner has been duly heard; 3, the cause duly and *definitively* decided—"il ne peut point appartenir à une puissance étrangère d'admettre chez elle un second procès sur la même cause, et celui qui l'intenterait peut dans tous les pays être repoussé par *exceptio rei judicatæ* que la sentence ait porté contre un sujet né dans le pays, ou contre un domicilié."

(*h*) *Fœlix*, s. 327, s. 328.

effect to a foreign judgment in all cases in which the following conditions have been fulfilled:—

(i.) The tribunal which pronounced the judgment must have been competent, according to the law of the state to which it belonged, to decide upon the matter adjudicated upon (*i*).

(ii.) The tribunal must be duly seised or possessed of the subject of its decision. The jurisdiction of it must be properly founded. It is not competent to a tribunal to cite before it a person who belongs neither by birth, nor domicil, nor temporary residence, to the state from which it derives its jurisdiction, unless he have property, or has incurred some obligation within the limits of the state, concerning which there is a litigation before this tribunal (*j*).

(iii.) The foreigner who was a party to the suit must have been fairly heard before the tribunal according to the laws of the state, and on an equality in every respect, including the right of appeal, with a native subject.

(iv.) The tribunal must have decided upon the very subject-matter which it is attempted to litigate upon. It must have decided definitively and either in the last resort (*en dernier ressort*), or, which is the same thing, without any appeal prosecuted from its decision to the superior courts of the state in which it was pronounced (*k*).

When these conditions are united, the *exceptio rei judicatæ* ought to be in all, and is in most, states admitted as a complete bar to a second litigation upon the subject so adjudicated upon.

DCCCCXXXV. To these four conditions some states

Merlin, Rép. Jugement, VI.–VIII.

Bynkershoek de Foro Leg. c. ii.; Forum Competens, origo et natura, Subjectio duplex—1, rei; 2, personæ.

(*i*) *Fœlix*, ss. 321, 327.

(*j*) *Vallée* v. *Dumergue*, 4 *Exchequer Rep.* p. 290.

[(*k*) See on this point a curious case, *Re Henderson, Nouvion* v. *Freeman*, *L. R.* 37 *Ch. D.* p. 244.]

add another, namely, that of *Reciprocity*. In them it is absolutely necessary for the validity of the plea *exceptio rei judicatæ*, in the case of a foreign judgment, that the state whose tribunal has pronounced it should itself admit the validity of the like plea in its own tribunals.

[Reciprocity is demanded by many, if not by the majority, of the continental states, before they will carry into execution the judgment of a foreign tribunal.

In Germany, foreign judgments are recognized, and execution is given, except in the following cases:—

i. If the judgment has not yet acquired final legal validity (*Rechtskraft*) in its own country.

ii. If the recognition or execution would violate some public law of the German Empire.

iii. If the foreign court was, according to German Law, not of competent jurisdiction.

iv. If the defendant is a German debtor and has not been cited either personally in the foreign country, or in German form in German territory.

v. If *reciprocity* is not *guaranteed* in the foreign country (*l*).

In the Austro-Hungarian monarchy reciprocity is an essential condition to the execution of foreign judgments.

Spain will enforce foreign judgments where reciprocity is practised, or there is a treaty on the subject (*ll*).

In Portugal foreign judgments are enforceable by the higher courts, but are subject to examination on the merits and to revision (*m*).

[(*l*) German Code of Civil Procedure, §§ 660, 661.

See a decision of the Imperial Court (*Entscheidungen des Reichsgericht in Civilsachen*, vii. 406) on an English judgment, wherein it was holden that the present practice of English courts with regard to foreign judgments does not constitute such guaranteed reciprocity as is required by the German law. Cited in full in *Pigott on Foreign Judgments*, chap. xiii. pp. 470 474.

Gillespie's translation of *Bar's International Law*, Note Z, on §§ 125, 126 (p. 587 of edit. 1883).

(*ll*) See Spanish Code of Civil Procedure, §§ 922-926.

(*m*) Portuguese Code of Civil Procedure, §§ 39, 1087-1091.]

In Belgium the courts of first instance have cognisance of judgments pronounced by foreign judges in civil and commercial causes. If there exist with the foreign state "*un traité conclu sur la base de la réciprocité*," the Belgian courts examine the judgment only on certain prescribed points, but may, it appears, completely revise it if there be no such treaty (*mm*).

The question is governed in Switzerland by Cantonal, and not by Federal, Law, so that the rule varies in different Cantons; but Final judgments given in civil matters in one Canton will be executed throughout the Federation (*n*).

In Russia foreign decisions are rendered executory according to treaty stipulations; but in the absence of treaties the *exequatur* of the Russian Courts is given after an examination on points other than the merits (*nn*).

Sweden, it is said, has not hitherto adopted the principle of recognizing foreign judgments in the absence of a treaty. The Norwegian Courts reopen all matters brought before them, not recognizing even Swedish judgments as conclusive.

Denmark does not demand reciprocity (*o*).]

DCCCCXXXVI. France and Italy (*oo*) do not require or

[(*mm*) *Complément des Codes Belges*, "Compétence." Loi du 25 Mars 1876, contenant le titre premier du livre préliminaire du Code de Procédure Civile. See Art. 10.

(*n*) *Constitution Fédérale*, § 61.

(*nn*) Russian Code of Civil Procedure, §§ 1250, 1275, 1276, 1278, 1279, 1281.

(*o*) See *Pigott on Foreign Judgments*, chap. xiii.]

(*oo*) [*Disposizioni sulla pubblicazione &c. delle leggi in generale*, Art 10. "Le sentenzie pronunziate da autorità straniere nelle materie civili avranno esecuzione nel regno quando siano dichiarate esecutive nelle forme stabilite dal codice di procedura civile, salve le disposizioni delle convenzioni internazionali."] See *Codice Civile*, lib. iii. tit. x. Art. 1350, 1351, [and 1973, which follow Arts. 1350, 1351, and 2123 of the French *Code Civil*. See, also, the Italian Code of Procedure (*Codice di Procedura Civile*), lib. iii. tit. xii., Della esecuzione degli atti delle autorità straniere; especially Art. 941]. The Two Sicilies and Tuscany had the same rule.

admit the principle of reciprocity as necessary for the plea of *exceptio rei judicatæ*. England, Scotland, and the United States of America (*p*) go a step further and practically execute a foreign judgment delivered by the tribunal of a state which does not itself give effect to a foreign judgment as constituting an *exceptio rei judicatæ*.

DCCCCXXXVII. It has been said that in some way or other all civilized states uphold foreign judgments; but they do not therefore allow them to take effect as if they were domestic judgments; they do not concede to them what the French call *l'exécution parée* (*executio parata*). Generally speaking, such an examination into a foreign judgment is instituted as suffices to show that it does not contravene the public policy of the state in which it is to be executed, and that it is clothed with the proper authority of the tribunal from which it emanates.

DCCCCXXXVIII. That the form and manner of its execution are exclusively governed by the law of the state which recognizes and executes the judgment, is a clear proposition of public as well as international Law, and does not appear to have been ever controverted.

DCCCCXXXIX. The jurisprudence and practice of states [with regard to executing foreign judgments] may be divided under three heads:

i. Of those which act upon the principle of reciprocity in recognizing foreign judgments.

ii. Of France, and other states which follow its example; these refuse to recognize the authority of the foreign judgments (*l'autorité de la chose jugeé*) [as such].

iii. Of England and the United States of America, which recognize, without regard to the principle of reciprocity, the authority of the judgment of a competent foreign tribunal.

DCCCCXL. With respect to the practice and jurisprudence of France upon this subject, it is most emphatically

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(*p*) *Vide infrà*, §§ dccccxli, dccccxlix.

condemned by Fœlix, as contrary both to the true interpretation of the municipal law of France (*pp*) and to the just demand of comity—as, in fact, deserving of unmitigated condemnation (*q*). It would appear, however, upon the authority of Massé (*qq*), that practically France gives almost as much effect to foreign judgments as England; France does not admit the authority of foreign judgments as such; they must be rendered capable of execution (*exécutoires*) by the decision of a French tribunal; but before this has taken place they are received as *evidence*, only to be rebutted by the strongest counter-evidence, of the facts on which they are founded and which they verify. Whether they ought to be clothed with the authority of a domestic judgment, without being revised and the facts re-examined, or whether they ought to be simply and without examination clothed with the authority of the *pareatis* of a French judgment, is a question which has, more than any other, divided the opinions of French jurists. Massé's opinion is, that the French tribunal ought to satisfy itself that the foreign judgment contains affirmatively and negatively the requisitions which have been mentioned above (*r*), and then to grant its *exequatur* for the execution of the judgment (*rr*).

[DCCCCXL.A. France, however, and other countries

(*pp*) The solution of this question depends upon the true construction of Art. 2123 of the *Code Civil*, and Art. 546 of the *Code de Procédure*, as compared with the ancient law of France. [Art. 546 is as follows: "Les jugements rendus par les tribunaux étrangers, et les actes reçus par les officiers étrangers, ne seront susceptibles d'exécution en France que de la manière et dans les cas prévus par les Articles 2123 et 2128 du Code Civil." Cf. Art. 1351 of the *Code Civil*.]

(*q*) "Suivant nous, cette interprétation extensive est contraire au sens littéral de la loi, à son esprit, aux rapports de bon voisinage qui existent ou doivent exister entre les diverses nations pour leur utilité réciproque, et enfin aux usages suivis dans la majeure partie des États de l'Europe."—*Fœlix*, s. 347.

(*qq*) *Massé*, liv. ii. tit. ii. c. i. num. 801.

(*r*) § dccccxxxiv.

(*rr*) *Massé*, *ibid.*

which follow her example, have at various times entered into treaties for giving reciprocal effect to foreign judgments: as, for instance, France and Sardinia, March 24, 1760, and Sept. 11, 1860 (*s*), France and Switzerland, July 18, 1828, and June 15, 1863 (*ss*).]

DCCCCXLI. No country has been more liberal than England in giving effect to the decisions of foreign courts. This will be found the just conclusion from the decisions which have taken place in British courts, from the time of the decision of *Weir's Case*, in the reign of James I., to the decision in *Vallée* v. *Dumergue* (*t*), in the English Court of Exchequer, in the year 1849, and *Barber* v. *Lamb*, in the Court of Common Pleas, in 1860 (*tt*) [and since].

DCCCCXLII. Great doubts, indeed, long existed, and perhaps are not now wholly removed, as to the *degree of effect* which should be given to foreign sentences in England; whether they should be wholly conclusive, or be considered as *primâ facie* evidence only, and liable to be rebutted.

It will be found, I think, upon examination of all the cases, that the doubt has arisen, partly from a want of discrimination of the principle applicable to judgments *in rem*, *in personam*, and *inter partes*; and partly from not sufficiently distinguishing between—

(i.) The propriety of questioning a foreign judgment upon the facts and merits; and

(ii.) The propriety of questioning it—upon the ground

[(*s*) See *The Delta*, *L. R.* 1 *P. D.* at p. 399.

(*ss*) *Vide suprà*, § dccccxxxi.]

(*t*) 4 *Exch. Rep.* p. 290.

(*tt*) 8 *C. B. Rep. N. S.* p. 95. See also—

Story, *Conflict of Laws*, c. xv.

Kent, *Comm.* vol. ii. part iv. lect. 27, p. 107.

Starkie on Evidence, vol. i. p. 270.

Taylor on Evidence, vol. ii. §§ 1533-1554.

Burge, *Comm.* vol. iii. p. 1044.

Smith, *Leading Cases*, vol. ii. note on the *Duchess of Kingston's Case*.

of want of jurisdiction, either intrinsically (*u*), or over the parties (*w*); upon the ground of its misunderstanding the English Law (*ww*); or upon the ground of the absence of the common requisites of justice, such as a litigating party being judge (*x*) or the defendant not being cited (*y*); for manifest

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(*u*) *Havelock* v. *Rockwood*, 8 *Term Rep.* p. 268.

(*w*) *General Steam Navigation Company* v. *Guillon*, 11 *Mee. & W. Rep.* p. 894: "It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resiant, or even present in France, when the suit began, so as to be bound, by reason of allegiance, or domicil, or temporary presence, by a decision of a French Court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer in an adverse suit in a foreign country, whose laws they were under no obligation to obey." See *Schibsby* v. *Westenholz, L. R.* 6 *Q. B.* p. 155 (1870).

[(*ww*) But as to this *vide infrà*, § dcccxliv.A.]

(*x*) *Price* v. *Dewhurst*, 8 *Simons, Rep.* p. 279.

(*y*) *Buchanan* v. *Rucker*, 1 *Campbell, Rep.* p. 63. *Becquet* v. *Macarthy*, 2 *Barn. & Adol. Rep.* p. 957. *Schibsby* v. *Westenholz, L. R.* 6 *Q. B.* p. 155 (1870). [*Colliss* v. *Hector, L. R.* 19 *Eq.* p. 334.]

But in *Douglas* v. *Forrest*, 4 *Bingham, Rep.* p. 686, proceedings were carried on against a party without any personal notice of the suit, and in his absence, where there had been only a Scotch warning, the judgment was enforced; but Chief Justice Best said (p. 703): "To be sure, if attachments issued against persons who never were within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorise their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." So if the party were subject to the jurisdiction when the suit commenced, *Cowan* v. *Braidwood*, 1 *M. & G. Rep.* p. 882, or where the party agreed to receive a particular notification, *Vallée* v. *Dumergue*, 4 *Exchequer Rep.* at p. 303. See *Copin* v.

error as to Law (*z*) ; for not being conclusive in the country where it has been pronounced (*a*) ; [upon the ground] that the matters in issue before the foreign tribunal were not the same (*b*), [or] that the proceedings in the foreign court were not taken for the same purpose as the suit in which its judgment is sought to be made conclusive, though the issue were the same (*c*) ; for being between different parties ; or on the ground of fraud (*d*), or that it was so grossly defective as to leave in doubt what had been decided (*e*).

DCCCCXLIII. With respect to impeaching foreign judgments upon the *merits*, the state of the English Law appears to be this : That where all the conditions above mentioned have been complied with, the foreign judgment *inter partes* would be considered as conclusive and unim-

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Strachan, Copin v. *Adamson*, *L. R.* 9 *Ex.* p. 345 [affirmed on appeal, 1 *Ex. D.* p. 17 ; *Rousillon* v. *Rousillon*, *L. R.* 14 *Ch. D.* p. 351.]

Though the Court of Chancery will not enforce a decree of a foreign court obtained against a party in his absence and without notice, yet where it finds that the proceedings in the foreign court were rendered necessary by his resistance to a proper demand, it will order him to pay the costs of those proceedings by way of damages. *Griffin* v. *Brady*, 39 *L. J.* (*Chanc.*) p. 136 (1871).

(*z*) See especially *Novelli* v. *Rossi*, 2 *Barn. & Adol. Rep.* p. 757, and note to this case at p. 765. See, however, *Godard* v. *Gray*, *L. R.* 6 *Q. B.* p. 139, *infrà*, § dcccxliv.A, and [*Meyer* v. *Ralli*, 1 *C. P. D.* p. 358.]

It was holden in *Simpson* v. *Fogo* (1 *J. & H. Rep.* p. 18 ; 1 *H. & M. Rep.* p. 195) that a foreign judgment might be examined and set aside for error on the face of it by reason of its disregard of the comity of nations. See *Liverpool Marine Credit Co.* v. *Hunter*, *L. R.* 3 *Ch. App.* p. 479.

Alison v. *Furnival*, 4 *Tyrwhitt*, *Rep.* p. 751, shows that an error as to its own law by a foreign tribunal must be very manifest indeed to induce the English Court to set aside the judgment on this ground. [*Vide infrà*, § dccccxlviii.]

[*Messina* v. *Petrococchino*, *L. R.* 4 *P. C.* p. 144 ; *infrà*, § dcccclv.A.]

(*a*) *Plummer* v. *Woodburne*, 4 *Barn. & Cress. Rep.* p. 625.

(*b*) [See] *Ricardo* v. *Garcias*, 12 *Clk. & Fin. Rep.* p. 368.

(*c*) In this case it would seem not to be conclusive : *Behrens* v. *Sieveking*, 2 *Myl. & Cr. Rep.* p. 602.

(*d*) *Bowles* v. *Orr*, 1 *Younge & Col. Exch. Rep.* p. 464. [*Aboulof* v. *Oppenheimer & Co.*, *L. R.* 10 *Q. B. D.* p. 295, a case which goes great lengths. *Ochsenbein* v. *Papelier*, *L. R.* 8 *Ch. App.* p. 695.]

(*e*) *Obicini* v. *Bligh*, 8 *Bingham*, *Rep.* p. 335.

peachable (*f*), and as following under the maxim of the Roman law, "res judicata pro veritate accipitur" (*g*). This opinion is supported not only by principle and analogy, but by the preponderating authority of the actually decided cases, and especially of those which have been adjudicated upon since the year 1840. The reasoning of Mr. Starkie—and it would not be easy to cite a higher authority on this point—is as follows :—

"The principle upon which a judgment is admissible at "all is, that the point has already been decided in a suit "between parties or their privies by some competent "authority, which renders future litigation useless and "vexatious. If this principle extends to foreign as well as "domestic judgments, as it plainly does, why is it to be less "operative in the former than in the latter case? If it does "not embrace foreign judgments, how can they be evidence "at all? By admitting that such judgments are evidence "at all, the application of the principle is conceded: why, "then, is its operation to be limited as if the foreign tribunal "had heard nothing more than *ex parte* statement and "proof" (*h*)?

Most unquestionably, however, such judgments would be considered, according to all the cases, as constituting the strongest *primâ facie* evidence of the right that could be produced, and as throwing a very heavy burden of disproof upon the party opposing it. It is, moreover, a general rule of English courts to regard the substance rather than the form of foreign judgments (*i*). And it seems clear that

(*f*) *Walker* v. *Witter*, 1 *Douglas*, p. 1 ; *Houlditch* v. *Marquis of Donegal*, 8 *Bligh*, *Rep. N. S.* p. 301 ; *Don* v. *Lippmann*, 5 *Clk. & Fin. Rep.* pp. 1, 20, are the cases which carry with them the most weight the other way, but less, however, upon a careful examination, than is usually ascribed to them.

(*g*) *Dig.* lib. i. t. v. 25 : "Ingenuum accipere debemus etiam eum, de quo sententia lata est, quamvis fuerit libertinus, quia res judicata pro veritate accipitur."

(*h*) *Starkie on Evidence*, vol. i. pp. 273–4 ; [chap. ii. p.350, ed. 1853].

(*i*) *Henley* v. *Soper*, 8 *Barn. & Cress. Rep.* at p. 20.

where a foreign judgment was offered to prove the same fact, but for a different or collateral purpose, then, if the judgment had been delivered by a court of exclusive jurisdiction, it would be conclusive evidence upon the question so incidentally arising (*j*).

DCCCCXLIV. The case of *Castrique* v. *Imrie* shows very clearly the different aspects under which a foreign judgment *in rem* and one *in personam* are judicially considered in England. In 1853, and until November 1854, C., a British subject, was sole and registered owner of the British ship A. In December 1853 the ship sailed for Australia, and thence to Madras. In Australia the master drew a bill of exchange on C. in favour of L., residing in Australia. C. never accepted the bill, and it was dishonoured at maturity. In November 1854 C., being still owner and registered as owner, mortgaged the ship to H., who was registered as mortgagee. In February 1855, H. sold the ship to E., who was then registered as owner. E., in April 1855, transferred the ship to the plaintiff, but the transfer to the plaintiff was not registered till April 1857. On the 10th of May 1855 C. was adjudged a bankrupt. On the 4th of May 1855 the ship arrived at Havre, in France, and B., who resided in England, and was holder of the bill of exchange, indorsed it to T., a French subject domiciled in France, who began a suit on the bill in France against the master, who appeared but allowed judgment to go against him without defence, and was condemned to pay the amount of the bill; and in consequence the ship was seized and detained in the custody of the French court. Neither C., nor H., nor E., nor the plaintiff was, before the judgment, served with any summons or process, nor had they any opportunity of appearing in the suit or objecting to the judgment. By the French law the ship could not be sold until the judgment was confirmed and the sale of the ship ordered. T. caused C., who appeared by the ship's papers

(*j*) *Starkie, ubi sup.* vol. i. p. 277 ; [chap. ii. p. 360, ed. 1853].

and certificate of registry to be sole owner, to be summoned, as also C.'s official assignee; but he did not summon H. or E. or the plaintiff. Judgment by default was given, by which the ship was to be sold. The plaintiff began a suit in France to replevy the ship from custody, which was decided against him [in two Courts], and the ship was sold; and the defendants bought her, and refused to give her up to the plaintiff on demand. The plaintiff brought trover, in England, for the ship. The Court of Common Pleas decided in his favour. But this decision was reversed by the Exchequer Chamber, on the ground that the judgment was substantially a judgment *in rem*; and the decision of the Exchequer Chamber was upholden by the House of Lords (*k*).

DCCCCXLIV.A. In *Godard* v. *Gray* (*l*) all parties were before the foreign court, but the foreign court, [in construing an English contract, acted upon an erroneous view of] English law. The judgment was, however, upholden.

In this case, the declaration was on a judgment of a French Court having jurisdiction in the matter. A plea set out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charter-party made in England, in which was a clause: "Penalty for the "non-performance of this agreement, estimated amount "of freight;" and that the court had, contrary to the English law, treated this clause as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of freight. The proceedings showed that both parties had appeared and been heard before the judgment was pronounced, but no objection was taken by the defendant to the mode of assessing the damages. It was holden by Blackburn and Mellor, JJ., that the defendant

(*k*) *Castrique* v. *Imrie*, 8 *C. B. N. S.* pp. 1, 405, *L. R.* 4 *H. L.* p. 414.

(*l*) *Godard* v. *Gray*, *L. R.* 6 *Q. B.* p. 139; 40 *L. J.* (*Q. B.*), p. 62 (1870). [See, however, *Meyer* v. *Ralli*, *L. R* 1 *C. P. D.* p. 358 (1876)].

could not set up, as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings. By Hannen, J., that the French court could only be informed of foreign law by evidence; and the defendant, having neglected to bring the English law to the knowledge of the French court, could not impeach the judgment given against him on the ground of error as to that law.

DCCCCXLV. In the event of the foreign judgment being in favour of the plaintiff and made the foundation of his suit in England, as he cannot issue, as has been seen, execution upon it here, he must enforce it by bringing a fresh action, [which used to be] technically called an *action of assumpsit* (*m*), for the recovery of what is due to him under the judgment. In that action the judgment forms evidence, or is in the nature of evidence, of a contract between the parties. It is important to observe, however, that the foreign judgment does not operate as a merger of the original ground of action; but if the plaintiff sue on the original ground, it may possibly be competent to the defendant to controvert it, notwithstanding the judgment; though even then it would be *primâ facie* evidence for the plaintiff (*n*).

DCCCCXLVI. If the foreign judgment be set up by way of *defence* to a suit in an English court, such a judgment pronounced adversely to the party who brings the

(*m*) [An English court of Equity would] entertain a bill founded on a decree of a Foreign court of Equity, for the purpose of giving effect to such decree, in regard to English property.

Houlditch v. *Marquis of Donegal*, 8 *Pligh*, *N. S.* p. 301.

Henderson v. *Henderson*, 6 *Q. B. Rep.* p. 288.

Paul v. *Roy*, 15 *Beavan*, *Rep.* p. 433.

(*n*) *Smith* v. *Nicholls*, 5 *Bingham*, *N. C.* p. 208.

Smith's Leading Cases, vol. ii. note on the *Duchess of Kingston's Case.*

suit for the second time in England will, if properly pleaded, be conclusive against him. If it be not pleaded, but put in evidence, it will be cogent, but not conclusive, evidence on behalf of the defendant (*o*). And it is probable, though the point has not been expressly decided, that if a foreign judgment had been recovered against the defendant, but had also been satisfied, the fact might be pleaded as a bar to a second suit in this country (*oo*).

DCCCCXLVII. The distinction commented upon in the last two sections between an original ground of action being merged in a foreign judgment, and such judgment being set up in defence, is clearly shown in the following decision (*p*). The plea to a declaration for money had and received was, that the plaintiff had impleaded the defendant for the identical causes of action [mentioned in the declaration], and had recovered from and been paid by the defendant the sum of 45*l.* and costs, in the Supreme Court of Constantinople, established under 6 & 7 Vict. c. 94. The plea was demurred to; but it was holden that a good answer to the action was disclosed by it.

DCCCCXLVIII. In the case of *Alison* v. *Furnival* (*pp*) an action was brought, in the English Court of Exchequer, by the provisional syndics of a bankrupt named Beuvain against a person named Furnival, founded upon the award of French arbitrators, who alone, according to the French law, were capable of deciding certain differences growing out of the partnership of the bankrupt and the defendant. The decision of the court [delivered by Baron Parke] is so important and so clear upon the principles of English jurisprudence, respecting questions of foreign evidence and foreign judgments, that it is here given at length:—

(*o*) *Smith* v. *Nicholls*, *ubi suprà*.
Taylor on Evidence, vol. ii. § 1739.
[(*oo*) *Ibid.* § 1740.]
(*p*) *Barber* v. *Lamb*, 8 *C. B. Rep. N. S.* p. 95; 29 *L. J. C. P.* p. 234 (1860).
(*pp*) 4 *Tyrwhitt, Rep.* p. 766 (1834).

"Many objections were taken in this case to the right "of the plaintiff to recover. It was contended, first, that "the agreement was not proved. Secondly, that this was "considered as an action on the award only, and that the "arbitrators were not duly appointed. Thirdly, that the "award was not made pursuant to the submission, and was "therefore void. Fourthly, that the plaintiffs had no "right to maintain the action. Fifthly, that the declaration "was not proved. We have considered these objections, "and are of opinion that they are not well founded, and "that the rule must be absolute to enter a verdict for the "plaintiffs.

"The first objection is, that the agreement was not "properly proved. This divides itself into two branches; "one, that even if there were no evidence of a duplicate "original in existence, this proof would not have been "sufficient, because the original, deposited with the notary, "ought to have been produced, or clear proof given that "by the written law of France it could not be removed. "Another branch of this objection is, that it was proved "that there was another original of this agreement in "existence; that the copy was only secondary evidence "and not admissible until the original was accounted for, "and that no such notice was given.

"It seems to be clear that this document was not "acknowledged before a notary, and is therefore not to be "deemed a notarial act. It was simply deposited for safe "custody; but there was sufficient evidence on the testi- "mony of M. Colin that it is the established usage in France, "though without any provision of the written law, not to "allow the removal of documents so deposited, and con- "sequently to let in secondary evidence of the contents, "for such evidence is admissible where it is in effect out of "the power of a party to produce the original, and that "was sufficiently proved in this case to the satisfaction of "the learned judge whose province it was to decide upon

" this question, and we cannot say that his decision was " wrong.

" The second branch of this objection is, that there was " evidence of the existence of a duplicate original, and " that there is an established rule that all originals must " be accounted for before secondary evidence can be given " of any one. There is no doubt as to this rule, but we " are not satisfied that there was any such duplicate " original in this case, which had the same binding force " and effect on the *defendant* as the one deposited and " proved; the only evidence of its existence is the expres- " sion *fait au double* at the foot of the agreement; but what " is the precise meaning of these terms, or what was the " nature of the duplicate executed in this case, if there " was one, was not made out by the evidence, and neither " in the numerous cross-interrogatories exhibited to the " witness Albert, nor his depositions, which were read " on the trial, is there one which hints at the existence of " any other obligatory document than the one deposited " with the notary. It is very true that the 1325th Article " of the *Code Civil* requires duplicates where there are two " interests; but I do not see how we can properly take " notice of their laws, as it was not proved on the trial. " The objection is one *strictissimi juris*, and beside the " justice of this case; and we think that it ought not to " succeed, unless the existence of the duplicate original, in " the proper sense of that word, was more distinctly made " out than it was in this case.

" I now come to the objections on the merits; and first, " as to the appointment of the arbitrators. It is con- " tended, in the first place, that by the express agreement " of the parties in article 12, merchants must be appointed, " and that the *Tribunal de Commerce* had power to appoint " others. This depends upon the construction of that " article. We do not think that the *Tribunal de Com-* " *merce* is restricted by this clause from appointing arbi- " trators not merchants. The parties are; but the court

" has a general power, and it is to be remarked that in " none of the proceedings in the French courts is the " objection taken that the *Tribunal de Commerce* exceeded " its powers in this respect. It is then said that the " *Tribunal de Commerce* has no power to annul the " appointment made by the defendant himself, which " they have done by their act of 15th November, 1827. " Now, by this act it appears that the appointment of a " foreigner as arbitrator was not a due exercise of the " power received by the twelfth article, and void, and " was the same as if no arbitrator at all had been named " by the defendant; and we must assume the judgment " of the court to be according to the French law, at least " until the contrary was distinctly proved, according to " the principle laid down in *Becquet* v. *Macarthy* (*q*).

" Next, it is contended that the *Tribunal* ought to have " appointed two arbitrators and not one; but is there any " substantial difference in allowing the former appoint- " ment to stand, naming another, and expressly appoint- " ing the arbitrators already named and the other jointly, " *de novo*? Certainly there is not, and in this respect " also we must assume that the *Tribunal de Commerce* " acted according to law, unless the contrary be proved.

" The third head of objection is to the award itself, " which it is suggested is not warranted by the sub- " mission. The award has proceeded upon the principle " that Beuvain, instead of being merely placed *in statu* " *quo*, and reimbursed the expenses incurred upon the " faith of the contract (which could have been done by " awarding to him as damages the expense of construct- " ing the new works, deducting the value of the materials), " has, moreover, under all the circumstances of the case, " a right to be placed in the same situation as if the " defendant had fulfilled his contract; and it is impossible " for me to say that this principle of adjudging the

(*q*) 2 *Barn. & Adol. Rep.* p. 957.

" damages is wrong, as being contrary to natural justice, " nor is there evidence that it is not conformable to the " law of France; indeed, it appears to follow the rule laid " down in the 1149th Article of the *Code Civil.*

"The fourth head of objection is, that the plaintiffs " cannot sue, and this objection subdivides itself into " several: Firstly, that by the terms of the appointment " two out of three cannot sue. The answer to this ob- " jection is, that by the law of France, in such a case, " two out of three may do an act as well as one sepa- " rately, and that is distinctly proved by M. Colin. " Secondly, it is said he ought to have the previous " authority of the *Juge Commissaire.* They are directed " by the appointment to act under the *surveillance* of the " *Juge Commissaire* by Article 492 of the *Code de Commerce*; " but M. Colin proves that they may bring an action " without his authority, for that is the effect of his testi- " mony; and though the defendant's witness Girard gave " evidence to the contrary, it seems to amount only to " this, that a syndic would not act properly in doing so, " not that the want of previous directions would avoid " the act and constitute a defence to the action; and this " is in conformity with the principle on which the cases " cited for the plaintiff, relating to actions brought by " assignees of insolvents in this country, were decided. " Thirdly, it is insisted that, by the law of France, *two* " cannot maintain an action for the debt due to the " bankrupt, and this also depends upon the evidence. " That all may sue appears by Articles 492 and 499 of the " *Code de Commerce,* both given in evidence; that the " bankrupt is deprived of the administration of his effects " appears by Article 442, also read at the trial, and M. " Colin deposes that two have the same power to act " under this appointment as three, and there is no evi- " dence to the contrary. Fourthly, it is insisted that if " two can bring an action, it is a condition precedent " upon the construction of the instrument of appointment

" that the third should be absent, or should have objected " to the act done, and that there was no proof of either " circumstance in this case; but we are of opinion " that this would be to put a very strict construction " upon the terms of the appointment. It seems to us that " the act of two only, sufficiently implies the absence or " want of consent of the third, and that the effect of the " authority given by the appointment is, in substance, " to authorize two to do valid acts as to third persons " without the other; and it was in fact proved that by " the law of France one of the arbitrators might act if " the other two were absent or not consenting, but that " they should not so act without the absence of, or want " of consent of, that other. Lastly, it is said that though " two may act and bring an action, yet they must sue in " the name of all. Now, the effect of the testimony of " M. Colin is, that two may sue in France without a " third, and the witness for the defendant does not prove " the contrary, and there seems no reason why it should " not be so. The property in the effects of the bankrupt " does not appear to be absolutely transferred to these " syndics in the way that those of a bankrupt are in this " country to assignees; but it would seem that the syndics " act as mandatories or agents for the creditors, the " whole three, or any two or one of them, having the " power to sue for and recover the debts in their own " names. This is a peculiar right of action created by " the law of that country, and we think it may, by the " comity of nations, be enforced in this, as much as the " right of foreign assignees or foreign corporations ap- " pointed or created in a different way from that which " the law of this country requires; *Dutch West India* " *Company* v. *Moses* (*r*); *National Bank of St. Charles* v. *De* " *Bernales* (*s*); *Solomons* v. *Ross* (*t*). We do not pro-

(*r*) 1 *Strange, Rep.* p. 612.
(*s*) 1 *Ryan & Moody, Rep.* p. 190.
(*t*) 1 *Hen. Blackstone, Rep.* p. 131, note.

" nounce an opinion whether this objection is available " on the plea of *nil debet*, or ought to have been pleaded " in abatement, though we were much struck with the " argument of the learned counsel for the plaintiffs on that " point, for we think it is not available at all upon the " evidence in this case.

" The fifth head of objection is that of variance—that " the award is said to be registered in the *Tribunal de* " *Commerce* instead of the *Cour de première instance*; but " the answer is, that this is clearly a surplusage.

" The sixth, that there is a variance, because Beuvain " is averred to be a bankrupt, whereas he is only an " insolvent *en état de faillite*; but this depends entirely " upon the argument that the English term 'bankrupt' " necessarily means the same as the French *banqueroute*, " which it does not; and it is to be observed that in the " English copy of the appointment of syndics the word " *faillite* is translated 'bankruptcy.' These are all the " objections to the plaintiff's right to recover; we think " that they are not well founded, and that the action " is maintainable without attributing to the acts of any " of the French courts the same force as if they had " been judgments between the litigating parties."

DCCCCXLIX. As to the decisions arrived at in the United States of America, Story observes as follows:—

" The general doctrine maintained in the Courts of " the United States in relation to foreign judgments " certainly is that they are *primâ facie* evidence, but that " they are impeachable."(*u*)

But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into, and that the judgment may be impeached

(*u*) *Conflict of Laws*, s. 608; cf. cases collected in Digest to *Curteis*, (*Amer.*) *Rep.* pp. 264-267.

for fraud. Beyond this no definite lines appear to have as yet been drawn.(*x*)

DCCCCL. *Judgments in rem* are adjudications upon the *status* of some particular subject-matter by a competent tribunal. [In the English High Court of Justice] these occur principally in the Probate, [Divorce,] and Admiralty [Division], but they occur also in the [other Divisions].

It is justly observed by Mr. Smith (*y*), that the universal effect of a judgment *in rem* depends upon the principle, that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon the *status* of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be. A condemnation in the Prize Court not merely declares the vessel prize, but vests it in the captors. Thereupon the *status* of the thing is thus altered, and the sentence altering it, whether from a court of exclusive jurisdiction or not, ought to conclude the whole world.

DCCCCLI. Since the case of *Bernardi* v. *Motteux* (*z*), it has been the clearly recognized law of England that the sentences of courts of competent jurisdiction to decide questions of prize are received in England as conclusive evidence in actions upon policies of insurance, and upon

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[(*x*) See *Kent, Comm.* vol. i. pp. 260, 261; vol. ii. pp. 119-122, and notes.]

(*y*) *Smith's L. C.* vol. ii. notes on the Duchess of Kingston's Case.

Geyer v. *Acquilar*, 7 *Term Rep.* at p. 696.

Scott v. *Shearman*, 2 *W. Blackstone, Rep.* p. 977.

[*The City of Mecca, L. R.* 5 *P. D.* p. 28; 6 *P. D.* p. 196, where it was holden that the Admiralty Division has jurisdiction to entertain an action *in rem* to enforce a judgment *in rem* obtained against a ship in a foreign Admiralty Court. This opinion was not overruled in the Court of Appeal; although the decision was reversed, as it subsequently appeared that the judgment of the foreign court was not *in rem*. Cf. *Kent, Comm.* vol. ii. p. 121, and *ibid.* note (*d*).]

(*z*) 2 *Douglas, Rep.* p. 576.

Lothian v. *Henderson*, 3 *Bosanquet & Puller, Rep.* p. 496.

Bolton v. *Gladstone*, 5 *East, Rep.* p. 155.

every subject immediately and properly within the jurisdiction of such foreign courts. The question in later cases has not been with reference to the conclusive nature of the sentence, but whether it was given upon the point in controversy.

"The general law" (Chief Justice Tindal says) "is "well known—that the sentence of a foreign court of "competent jurisdiction is binding upon all parties and "in all countries, as to the fact upon which the condem-"nation proceeded, where such fact appears on the face of "the sentence free from doubt and ambiguity. But it is "at the same time as well established that, in order to "conclude the parties from contesting the ground of con-"demnation in an English court of law, such ground must "appear clearly upon the face of the sentence; it must "not be collected by inference only" (*a*).

DCCCCLII. It need hardly be stated that, unless the foreign court be one of competent jurisdiction, its sentence has no effect at all. Accordingly Lord Stowell designated the adjudication of the prize court of a *belligerent* power sitting in a *neutral* country, as "a licentious attempt to "exercise the rights of war within the bosom of a neutral "country" (*b*).

(*a*) *Dalgleish* v. *Hodson*, 7 *Bingham*, *Rep.* p. 504.

See, too, Lord Alvanley's summary of the decisions in *Baring* v. *Clagett*, 3 *Bosanquet & Puller*, *Rep.* p. 215.

Lord Ellenborough, however, said, in *Fisher* v. *Ogle* (1 *Campbell*, *Rep.* p. 420): "It is by an *overstrained comity* that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded." But this remark appears to have been extorted by the decisions of the French tribunals during the last war, which he designated "the piratical way in which they proceed." This remark he well reconciled with Lord Mansfield's judgment in *Salloucci* v. *Woodmass*, *Park on Insurance*, p. 362 (7th ed. p. 528).

Arnould on Insurance, vol. ii. p. 645.

(*b*) *The Flad Oyen*, 1 *C. Rob. Adm. Rep.* p. 135.

See, too, *Havelock* v. *Rockwood*, 8 *Term Rep.* at p. 276; *Donaldson* v. *Thompson*, 1 *Camp. Rep.* p. 429.

DCCCCLIII. The courts of the United States (*bb*) hold the doctrine of the conclusiveness of judgments *in rem* when the proceedings have been regular quite as strongly upon the general principle as the courts in Great Britain; but it would appear that the latter hold such judgments conclusive not only as to the actual *res* decided, but as to all facts and matters incidentally decided (*c*). The decisions of the American courts are not harmonious on this subject.

DCCCCLIV. *Foreign judgments upon matters in their nature local* would be treated as conclusive in England. The difficulties necessarily incident to a re-examination of such matters in another country render this rule one of common justice as well as common sense (*cc*).

The case of landed property affords an obvious illustration of this position. But the effect ascribed to foreign sentences in England will not be greater than that which they possess in the country in which they were given. A foreign judgment therefore *in rem* between two parties will not be conclusive against a third party, unless such an effect would be ascribed to it in the country of the judgment.

DCCCCLV. Not merely, however, in the case of landed property, but where the *res*, be it personalty or realty, is within the limits of the territory of the court (*d*) which

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[(*bb*) See *Kent*, *Comm.* vol. ii. pp. 120–122.]

(*c*) *Bad* v. *Bamfield*, 3 *Swanston*, *Rep.* p. 604. Lord Nottingham accorded a perpetual injunction to restrain certain suits of trespass and trover for seizing the goods of the defendant (Bamfield) for trading in Iceland contrary to certain privileges granted to the plaintiff and others. The property was seized and condemned in the Danish Courts. Lord Nottingham held the sentence conclusive against the suits, and awarded the injunction accordingly. See *Hobbs* v. *Hemming*, 17 *C. B. Rep. N. S.* p. 791 ; *antè*, vol. iii. § ccxxvii.

[(*cc*) See *Moor* v. *Anglo-Italian Bank*, *L. R.* 10 *Ch. D.* p. 681.]

(*d*) So holden in *Cammell* v. *Sewell*, 5 *H. & N. Rep.* p. 728. See *Koster* v. *Sapte*, 1 *Curteis*, *Rep.* at p. 701. In *Simpson* v. *Fogo* (1 *J. & H. Rep.* p. 18 ; 1 *H. & M. Rep.* p. 195), the Vice-Chancellor thought that even a foreign judgment *in rem* might be examined and

gave the sentence—that sentence would be holden probably both in England and in the United States as binding upon the property within the territory. But it would probably be considered as confined within those limits, and as having no exterritorial effect, especially where the parties affected by the sentence were not at the time subject to the jurisdiction of the court by domicil, residence, or origin, and had never appeared or contested the suit (*e*).

Cases upon this point of law may probably arise when proceedings are attempted to be taken by creditors against personal property of a debtor in the hands of third persons, or against debts due to him from third persons—a proceeding sometimes technically styled the process of *foreign attachment*, or *foreign garnishment*, or in American law *trustee process*. Many cases of this description as yet undecided will probably arise, to the decision of which the application of the principles above stated may furnish a safe guide.

DCCCCLV.A. The case of *Messina* v. *Petrococchino* (*f*), which came on appeal to the Judicial Committee of the Privy Council from the Court of Appeal for the Island of Malta, should here be inserted. In that case a Greek ship having on board a cargo consigned to Malta, the port of destination, encountered severe weather on her passage down the Black Sea, and was obliged, for the preservation of her cargo, to jettison her boats, spars, and cables. Being disabled, she put into Constantinople, where the captain applied to the Greek Consular Court and obtained an order for a survey of the ship and cargo, and a sentence of average settlement, with the appointment of a curator, who, by virtue of the authority conferred upon him,

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disregarded if it appeared on the face of it to be founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations. See also *Liverpool Marine Credit Co.* v. *Hunter* (1868), *L. R.* 3 *Ch. App.* p. 479.

(*e*) *Story*, ss. 549, 592 *a*, 607.

(*f*) *L. R.* 4 *P. C.* p. 144 (1872).

hypothecated the cargo, and caused a bottomry bond to be executed thereon for freight and the necessary expenses of transhipping and forwarding the cargo. The cargo having been transhipped arrived at Malta, where proceedings were taken in the Court of Commerce by the consignee to set aside the sentence of average settlement and to annul the bottomry bond. The Court of Commerce declared its incompetency to decide regarding the average settlement, but pronounced the bottomry bond null and void. On appeal to the Court of Appeal at Malta, that court reversed the decree of the Court of Commerce so far as regarded its competency to decide the average acts and settlement, and ordered, as regarded the decision of the nullity of the bottomry bond, that such decision should be set aside until a definitive sentence on the average acts and settlement should have been come to by the Court of Commerce. The Court of Commerce gave a decision on the case thus remitted, against the consignee, which was equivalent to a non-suit. On appeal from this decision, the Court of Appeal at Malta was of opinion that the captain having taken the legal course before the Consular tribunal at Constantinople, and that court having, on the report of experts, appointed a curator of the cargo, and declared the voyage ended at Constantinople, such curator was the attorney for the owners of the cargo, and had authority to hypothecate the same; that where the formalities of a consular authority, and verbal process justifying the expenses necessitating the loan, are observed, the lender on bottomry is exonerated from justifying the necessity for the loan, or making inquiry as to the facts causing such necessity; and they decided for the validity of the bond.

The Judicial Committee of the Privy Council in their judgment, after stating the circumstances of the case, said:—

"It has been strongly urged upon their Lordships that "all the proceedings in the Greek Consular Court, which

" were in substance upholden by the Court of Appeal in " Malta, were invalid, and principally upon the following " grounds: that, with regard to the bottomry bond, no " adequate necessity is shown for having recourse to it, " and also that it is bad because not preceded by any " communication, or attempt at communication, with the " owner of the cargo; and, with regard to the general " average, that the proper place for the adjustment of it " was Malta, the port of destination, and not Constanti- " nople.

" Their Lordships are called upon now to pronounce a " judgment in favour of these propositions, sitting as an " appellate tribunal from the Court of Malta; in other " words, to give that judgment which it is alleged that " the court appealed from ought to have delivered.

" Their Lordships are not sitting as an appellate tri- " bunal from the Greek Consular Court at Constantinople. " It is necessary to make this statement *in limine*, however " obvious it may appear, for the following reason. If the " Greek Consular tribunal was a competent court, having " jurisdiction over the ship and cargo, then the sentence " of that court was not open to examination by the court " at Malta, but would be properly enforced by it; or, in " the clear language of Lord Ellenborough, in the case of " *Power* v. *Whitmore* (*g*), ' By the comity which is paid by " ' us to the judgment of other courts abroad of competent " ' jurisdiction, we give a full and binding effect to such " ' judgments, as far as they profess to bind the persons " ' and property immediately before them in judgment, " ' and to which their adjudications properly relate.' This " case was decided in the year 1815.

" And it is to be observed that, though the earlier " cases exhibit some fluctuation and variety with respect " to the application of this doctrine, it has become firmly " established by a series of later cases as an unquestionable

(*g*) 4 *Maule & Selw. Rep.* at p. 150.

"maxim of our jurisprudence. The strongest and the "last case is that of *Castrique* v. *Imrie*, decided by the "House of Lords in the year 1870 (*h*).

"A foreign judgment of a competent court may indeed "be impeached, if it carries on the face of it a manifest "error; if it is shown to have been obtained by fraud, or "to be wanting in the conditions of natural justice; and "it cannot be applied to persons other than those who "were parties to the litigation decided by it, except in "cases where the judgment is *in rem*.

"No such infirmities can in this case be predicated of "the decree and orders of the Greek court; and, therefore, "the consideration as to the competency of that court "alone remains to be considered.

"It has been much pressed upon us that there is no "evidence of such competence, and that the acknowledged "rules of the general maritime law applicable to bottomry "bonds on cargo have been violated by the proceedings of "the Court.

"Now this was the sentence of a Greek Consular court "sitting at Constantinople upon a Greek ship, and a cargo "owned by Greek subjects.

"The holder of the bottomry bond was a stranger who, acting *bonâ fide*, advanced his money on the bond.

"That the Ottoman Porte has given to the Christian "Powers of Europe authority to administer justice to their "own subjects according to their own laws within its "dominions is a fact *publici juris*, which their Lordships "are not now called upon for the first time to take cogni-"zance of, and which they fully recognized in the case "of *The Laconia*, in the year 1863 (*i*). It would be "strange indeed if it had been otherwise, inasmuch as "Her Majesty has established a Supreme Consular Court "at Constantinople, and Provincial Courts, with rules for

(*h*) *L. R.* 4 *H. L.* p. 414.
(*i*) 2 *Moore, P. C. Rep. N. S.* at p. 185.

" the exercise of civil and criminal jurisdiction. This " kind of jurisdiction exercised by the Consuls of Christian " States in Mahometan countries is to be carefully distin- " guished from the ordinary powers exercised by Foreign " Consuls in Christian States.

" Judicial cognizance being therefore taken by their " Lordships of the fact that a Greek tribunal, capable of " exercising jurisdiction in this case, existed at Constan- " nople, it is the duty of their Lordships to apply to such " a tribunal the ordinary principles which regulate the " reception of the judgment of a foreign tribunal by other " courts."

Their Lordships then referred to and cited the judgment of the Court of Queen's Bench in the case of *Dent* v. *Smith* (*k*), and then continued:—

" With the principles of this judgment their Lordships " are disposed entirely to agree. They think it must be " presumed that the Greek court rightly interpreted and " applied the Greek law; that by that law they had the " power, and duly exercised it, of deciding that, in the " circumstances, Constantinople should be considered as " the place of the ship's destination, and the average " adjusted according to the Greek law in force at that " place; and that the bottomry bond was necessary and " valid, though entered into without citing M. Cossudi, " the agent of the owners of the cargo, who was, however, " their Lordships must remark, aware, as is proved by his " letter, of the arrival of the ship in a disabled state at " Constantinople, and, it must be presumed, of the pro- " ceedings in the Greek court, though he did not appear " and take any part in them.

" It must also be presumed that the court had power " to appoint the average or judicial staters, and that their " decision gave authority to the curator of the cargo to " contract the bottomry bond in question with Facher,

(*k*) *L. R.* 4 *Q. B.* pp. 445, 446 [*suprà*, § dcccxxviii].

" and to tranship the cargo on board the Otto Sorelle, and " that this decision was rightly confirmed by the Greek " Consul General. Their Lordships do not feel themselves " at liberty to enter into the discussion into which they " were invited by counsel for the appellant, or into the " question whether the Greek law be or be not at variance " with the general maritime law upon these points. Those " questions would be properly raised on appeal to the " Greek Appellate Court, whether sitting at Athens or " elsewhere, and could not properly be discussed either " before the Court at Malta, or before this tribunal."

DCCCCLVI. It must be borne in mind that there is an essential difference between foreign sentences of *contentious*, and those of *voluntary* jurisdiction. The latter contains in reality the act of the parties to the suit, to which the formalities of a court of justice are added as witnessing this act and consent. The former is the act of the judge himself; and it is the effect of sentences emanating from contentious jurisdiction that has been considered in the preceding pages.

NOTE TO THE FOREGOING CHAPTER.

List of the principal decisions, since 1830, on the effect of Foreign Judgments in England :—

1830. *Martin* v. *Nicholls*, 3 *Simons*, p. 458. Apparently reversed, [in principle], 1834, *Houlditch v. Donegal*, 8 *Bligh*, *Rep.* p. 301.
1831. *Novelli* v. *Rossi*, 2 *Barn. & Adol. Rep.* p. 757.
—— *Becquet* v. *MacCarthy*, *ib.* p. 951.
1834. *Alison* v. *Furnival*, 4 *Tyrwhitt*, *Rep.* p. 751.
1834. *Houlditch* v. *Donegal* (House of Lords), 8 *Bligh*, *Rep.* p. 301.
1838. *Koster* v. *Sapte*, 1 *Curteis*, *Rep.* at p. 701.
1839. *Smith* v. *Nicholls*, 5 *Bingham*, *N.C. Rep.* p. 208.
—— *Ferguson* v. *Mahon*, 11 *Adol. & Ellis*, *Rep.* p. 179.
1842. *Callandar* v. *Dittrich*, 4 *Manning & Granger*, *Rep.* p. 68.
1844. *Robertson* v. *Struth*, 5 *Q. B. Rep.* p. 941.
—— *Henderson* v. *Henderson*, 6 *Q. B. Rep.* p. 288.
1845. *Ricardo* v. *Garcias*, 12 *Clk. & Fin. Rep.* p. 368; difficult to reconcile with *Houlditch* v. *Donegal*, *ubi sup.*
1846. *Reynolds* v. *Fenton*, 3 *C. B. Rep.* p. 187.
1849. *Vallée* v. *Dumergue*, 4 *Exchequer Rep.* p. 290.
[1850. *Bank of Australasia* v. *Harding*, 9 *C. B. Rep.* p. 661.]
1851. *Bank of Australasia* v. *Nias*, 16 *Q. B. Rep.* p. 717, as to Colonial judgments.
1852. *Frith* v. *Wollaston*, 7 *Exchequer Rep.* p. 194.
—— *Paul* v. *Roy*, 15 *Beavan*, *Rep.* p. 433. An English Court will enforce a final judgment, but not an interlocutory order, of a foreign court.
1853. *Meeus* v. *Thelluson*, 8 *Exchequer Rep.* p. 638. Foreign judgment upon a bill of exchange. Replication holden bad for not stating what the foreign law was at the time of the acceptance of the bill.
1856. *Kelsell* v. *Marshall* (Court of Common Pleas), 2 *Jurist* (N. S.) p. 1142, as to Colonial judgment.
—— *Reimers* v. *Druce*, 23 *Beavan*, *Rep.* p. 145. Master of the Rolls reviews former cases. Error on the face of a foreign judgment, apparent without the help of extrinsic evidence, invalidates it.
1860. *Cammell* v. *Sewell*, 5 *H. & N. Rep.* p. 728.
—— *Barber* v. *Lamb*, 8 *C. B. Rep. N. S.* p. 95.

[1861. *De Cosse Brissac* v. *Rathbone*, 6 *H. & N. Rep.* p. 301.]
1862. *Simpson* v. *Fogo*, 1 *J. & H. Rep.* p. 18; 1 *H. & M. Rep.* p. 195.
1863. *Crispin* v. *Doglioni*, 3 *Swab. & Trist. Rep.* p. 96; *L. R.* 1 *H. L.* p. 301. Authority of decision of Court of Domicil as to succession.
1868. *Liverpool Marine Credit Co.* v. *Hunter*, *L. R.* 3 *Ch. App.* p. 479.
1869. *Dent* v. *Smith*, *L. R.* 4 *Q. B.* p. 414. In this case, which was an action against underwriters to recover general average paid by order of a Russian Consular Court at Constantinople, it was holden not necessary to show strictly that the Russian Court had acted within its jurisdiction, as it had the custody of the property, and the only way of recovering it was to pay the general average.
1870. *Castrique* v. *Imrie*, 8 *C. B. N. S.* pp. 1, 405; *L. R.* 4 *H. L.* p. 414.
[—— *Godard* v. *Gray*, *L. R.* 6 *Q. B.* p. 139.
—— *Schibsby* v. *Westenholz*, *ibid.* p. 155.]
1872. *Messina* v. *Petrococchino*, *L. R.* 4 *P. C.* p. 144.
[1873. *Ochsenbein* v. *Papelier*, *L. R.* 8 *Ch. App.* p. 695.]
1874. *Copin* v. *Strachan*, *Copin* v. *Adamson*, *L. R.* 9 *Ex.* p. 345; 1 *Ex. D.* p. 17.
[1876. *Meyer* v. *Ralli*, *L. R.* 1 *C. P. D.* p. 358.
—— *The Delta*, *L. R.* 1 *P. D.* p. 393.
1879. *The City of Mecca*, *L. R.* 5 *P. D.* 28, 6 *P. D.* 106.
1880. *Rousillon* v. *Rousillon*, *L. R.* 14 *Ch. D.* p. 351.
1882. *Abouloff* v. *Oppenheimer & Co.* *L. R.* 10 *Q. B. D.* p. 295.
1887. *Re Trufort*, *Trafford* v. *Blanc*, *L. R.* 36 *Ch. D.* p. 600.
—— *Société Générale de Paris* v. *Dreyfus Brothers*, *L. R.* 37 *Ch. D.* p. 215.
—— *Re Henderson*, *Nouvion* v. *Freeman*, *L. R.* 37 *Ch. D.* p. 244.]

CHAPTER XLVII.

LEX FORI—PROVISIONAL MEASURES—INTERDICTA.

DCCCCLVII. It often happens that before the regular institution of a suit, justice and the interest of parties may require the aid and intervention of a court:

(1.) To prevent the apprehended, or the actual, infringement of rights.

This intervention may take the shape of a measure affecting either the property or the person about to infringe such rights.

(2.) Or it may happen that an obligor or debtor is about to escape from the jurisdiction to which by virtue of his debt or obligation he is amenable, and the obligee or creditor may desire to prevent this escape by arrest of his person.

DCCCCLVIII. (1.) The former class of cases is provided for in all States which have founded their jurisprudence upon the Roman Law (*a*), by the adoption of measures analogous in their effect to the Prætorian Interdicts. These were, properly and originally speaking, of a

(*a*) *Inst.* lib. iv. t. xv. : "Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid fieri, aut fieri prohibebat, quod tunc maximè fiebat, cum de possessione aut quasi possessione inter aliquos contendebatur. Sec. 1 : Summa autem divisio interdictorum hæc est : quod aut prohibitoria sunt, aut restitutoria, aut exhibitoria. . . . Sunt tamen, qui putent propriè interdicta ea vocari quæ prohibitoria sunt, quia interdicere sit denunciare et prohibere : restitutoria autem et exhibitoria, propriè decreta vocari. Sed tamen obtinuit, omnia interdicta appellari : quia inter duos dicuntur."

prohibitory character (*prohibitoria*), though in the time of Justinian they embraced measures having for their object the *restitution* of property (*restitutoria*), and the compelling the production of a particular person, as [for instance] a slave or a child, subject to the control and within the power of another (*exhibitoria*).

DCCCCLIX. These proceedings, which the French Law calls conservative and provisional measures (*b*) (*mesures conservatoires, mesures provisoires*), are admitted by that law in exception to its general principle; for even in the case of two foreigners the French Law applies this provisional remedy, while it refuses to entertain the question of the merit (*le fond*) of their dispute.

The president of a tribunal may empower a foreigner to seize money or effects in the possession of a Frenchman belonging to a foreign debtor.

It is competent also to the French tribunals to order an inventory of goods situated in France, and appertaining to a deceased stranger; although the proceedings necessary to secure by probate or administration a representative to the deceased have been taken, or although, in the language of French Law, *the succession has been opened* in a foreign State; and also, perhaps, to order a deposit of security for the value of the effects. It is also competent to the French tribunals to order such provisional measures as may be necessary to secure the personal safety and means of existence of a foreign wife or husband, or of their children. But it is only at the instance of a *commission rogatoire* that the French tribunal will nominate an administrator of the goods of a stranger physically or morally incapable to act for himself.

DCCCCLX. The English Law does not set itself in motion, as the foreign law often does, to preserve by a provisional measure the goods of a deceased foreigner. The English Courts will, however, on their aid being

(*b*) *Fœlix*, ss. 162, 250.

invoked, extend their *injunction* (a provisional measure analogous to and founded upon the Roman *interdictum*) to the foreigner as well as to the Englishman (*c*). Some striking instances of the exercise of this jurisdiction, in accordance with the soundest principles of Comity, will be found in the following sections.

DCCCCLXI. In the case of *Caldwell* v. *Vanvlissengen* (*d*), an injunction was granted against subjects of the kingdom of Holland, to restrain them from using on board their ships within the dominions of England, without the license of the plaintiffs, an invention, to the benefit of which the plaintiffs were exclusively entitled under the Queen's Patent.

Vice-Chancellor Turner in giving judgment said :—"I "take the rule to be universal, that foreigners are in all "cases subject to the laws of the country in which they "may happen to be; and if in any case, when they are "out of their own country, their rights are regulated and "governed by their own laws, I take it to be not by force "of those laws themselves, but by the law of the country "in which they may be; adopting those laws as part of "their own law for the purpose of determining such "rights." He then refers to the opinions of Story (*e*); of Huberus, Boullenois, and Vattel, upon this subject; and continues :—"In this country indeed the position of "foreigners is not left to rest upon this general law, but "is provided for by Statute; for by the 32 Henry VIII. "c. 16, s. 9, it is enacted, 'That every alien and stranger "'born out of the King's obeisance, not being denizen, "'which now or hereafter shall come in or to this realm, "'or otherwise within the King's dominions, shall, after

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[(*c*) The provisional measures of granting injunctions, mandatory and prohibitory, and of appointing receivers, are regulated by the Judicature Act, 1873, s. 25, subs. 8, and the Rules of the Supreme Court, 1883, Order L.]

(*d*) 9 *Hare, Rep.* p. 415.

(*e*) *Conflict of Laws*, s. 541.

" 'the 1st of September next coming, be bounded by and " 'unto the laws and statutes of this realm, and to all and " 'singular the contents of the same' (*f*). Natural justice, " indeed, seems to require that this should be the case; " when countries extend to foreigners the protection of " their laws, they may well require obedience to those " laws, as the price of that protection. These defendants, " therefore, whilst in this country, must, I think, be sub- " ject to its laws."

DCCCCLXIV. (*g*) (2.) With respect to the second class of cases (*h*)—viz. those relating to the arrest of a foreign debtor who is about to escape from the jurisdiction (*i*). The law upon this subject, both as to its substance and the form of procedure, is, of course, local; it is strictly the *lex fori*; the *lex loci contractûs* has no influence upon this matter.

In England the provisional arrest before judgment, applicable equally to subject and foreigner, has been [dealt with in the Debtors Act, 1869]. (*k*). It is also competent to English Courts to issue against a foreign debtor a writ of *ne exeat regno*.

DCCCCLXV. It would seem, however, that there must be a very strong case indeed to induce a Court to restrain a foreigner, domiciled in another country, from proceeding to obtain payment of debts according to the law of the country in which he is domiciled (*l*).

(*f*) Now repealed.

(*g*) [§§ dcccclxii. and dcccclxiii. relating to Trade Marks belonging to an alien ami have been left out in this edition, as their substance had already been given in chap. xxvii.] It would appear that a person against whom an injury is fraudulently committed may have a remedy in the courts of any country where the fraud occurs, and even although he is at the time an alien enemy.

(*h*) *Vide suprà*, § dccccl vii.

(*i*) Cf. *Fœlix*, liv. ii. t. v. Des mesures conservatoires ou provisoires, &c.

(*k*) 32 & 33 Vict. c. 62, s. 6. [Rules of the Supreme Court, 1883, Order LXIX.]

(*l*) *Carron Iron Company* v. *Maclaren*, 5 *H. L. Cases*, p. 416.

DCCCCLXVI. An English Court will not lend its aid to compel a discovery in aid of the prosecution or defence of an action in a foreign Court (*m*).

DCCCCLXVII. An English Court of Equity would enforce, under the old law, for the benefit of the crown, a trust of real estate created in favour of an alien. The devise being valid, and there being a *cestui que trust*, who could take, but not hold, the crown became entitled beneficially, but not the trustee or heir-at-law (*n*).

[*Law* v. *Garrett*, *L. R.* 8 *Ch. D.* p. 26—an instance of non-interference by an English Court when proceedings were pending in a Russian Court, to which the parties, who were British subjects, had previously agreed to refer all disputes.]

(*m*) *Bent* v. *Young*, 9 *Simons*, *Rep.* p. 180.

[See] *Paul* v. *Roy*, 15 *Beav. Rep.* p. 433.

(*n*) *Barrow* v. *Wadkin*, 24 *Beav. Rep.* p. 1.

This rule of law is now repealed by 33 Vict. c. 14, s. 2. *Vide antè*, vol. i. App. v.

CHAPTER XLVIII.

PRIVATE INJURIES—WHERE TO BE REDRESSED.

DCCCCLXVIII. [THIS chapter deals with the fifth and last division of this volume (*a*).] With respect to the class of *quasi obligationes* arising from the infliction of an injury (*maleficium*) upon a private individual, it is to be remembered that the prosecution of the injurer may have two objects—

i. Pecuniary reparation to the injured party, to obtain which a *civil* action may suffice. In this case, as Donellus says, "civiliter agitur, id est de privato damno, et pecuniâ, "quam inde debitam actor prosequatur" (*aa*).

ii. Or, secondly, the object may be the vindication of the authority of the law; the punishment of the offender; the deterring others from the commission of the like offence. To obtain one or all of these ends the *criminal* action is necessary: "Quatenus" (to use again the words of Donellus) "de his agitur criminaliter ad pœnam et vindictam criminis" (*b*).

The Penal or Criminal Law of a State appertains, therefore, partly to its Private, partly to its Public Law.

DCCCCLXIX. That portion of it which relates to Public Law, so far as its administration affects the welfare

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[(*a*) *Vide suprà*, § XXX.]

(*aa*) *Donellus, De Jure Civ.* lib. xvii. c. xvi.: "Ubi de maleficiis et criminibus agi oporteat."

[(*b*) *Donellus, ibid.*]

Bar, § 66.

Wharton, Conflict of Laws, ch. xiii.

See *Phillips* v. *Eyre*, *L. R.* 4 *Q. B.* p. 225; 6 *Q. B.* p. 1.

of other States, so far as it partakes of an International character, has been already treated of in the first volume of this work. For instance, whether a state, apart from treaty, is bound by the obligation of *Extradition*—how far, and between what states, treaties upon this subject have affected the general law—exterritorial jurisdiction in the case of crimes committed on board national ships on the high seas—mixed jurisdiction in the case of crimes committed on board foreign ships on the high seas—the crime of piracy on the high seas—the peculiar jurisdiction allowed by sufferance or treaty in Mahometan and heathen countries—are matters which concern directly the State in its collective capacity, and not individuals; or which, indirectly concerning individuals, and appertaining to Comity, have been treated of in the former volumes of this work (*bb*).

DCCCCLXX. But Comity, or Private International Law, may be properly (*c*) said to be concerned with injuries committed against the property or person of some one resident or commorant within the limits of its jurisdiction, for which injuries a civil reparation is demanded; and it is proposed to offer a very few observations on the jurisdiction which is or ought to be exercised by the ordinary domestic tribunals of States upon this subject.

DCCCCLXXI. There are some questions which are improperly classed under this head, but which clearly belong to the category of Public Law (*d*).

For instance, whether a state will take cognizance of an offence committed by one of its subjects within the jurisdiction of a foreign state, and if so, what law and what forms of procedure it will apply to his trial (*e*), are clearly

(*bb*) See vol. i. part iii. chapters ii. xviii. xix. xx. xxi.
See also *Fœlix*, liv. ii. tit. ix.
Story, Conflict of Laws, chapter xvi. On Penal Laws and Offences.
Essay on Foreign Jurisdiction and the Extradition of Criminals, by the Right Hon. Sir G. Cornewall Lewis, 1859.

(*c*) Savigny (*R. R.* viii.) is, however, of a contrary opinion.

(*d*) *Vide antè*, vol. i. § cccxxxiv.

(*e*) Fœlix (liv. ii. t. ix. ch. ii. and ch. iv.) treats of both these questions.

questions of Public and not of International Law. "The "*lex loci*" (Lord Brougham observes) "must needs govern "all criminal jurisdiction from the nature of the thing and "the purpose of that jurisdiction" (*f*).

DCCCCLXXII. A State, however, lies under no obligation, and it is not within its moral competence, to punish a person happening to be resident within its limits, but who is not its subject, and who is charged with having committed a crime, out of its jurisdiction, against the subject of a third state. Jurists, however, are not agreed upon this point; and many contend that a *delictum*, an offence against Natural Law, is, wherever it has been committed, punishable everywhere. Some are of opinion that the state, in which the criminal is, ought to punish him, if the state in which he committed the crime made a request to this effect, but not if it be made by the injured person. Others think that the criminal ought to be surrendered; others, that he ought to be expelled from the state.

DCCCCLXXIII. It is, however, within the moral competence of, and indeed obligatory upon, a state, to punish all crimes committed within its limits, not only upon one of its own subjects, but upon any person commorant within its dominions. Nor can it make any difference in principle whether the injured person happen to be or not to be within the dominions at the time when the injury is inflicted. For instance, if a forgery be committed within the realm to the injury of an absent stranger, he is not the less on account of his absence entitled to insist upon criminal proceedings being taken against the forger. These principles are generally maintained by International jurists and writers on Public and Criminal Law, and are incorporated into the texts of many modern codes (*ff*). It is a subject of legiti-

(*f*) *Warrender* v. *Warrender*, 9 *Bligh*, *Rep.* at p. 119; 2 *Cl. & Fin. Rep.* at p. 538.

[(*ff*) German Penal Code (*Strafgesetzbuch für das Deutsche Reich*), Einleitende Bestimmungen, § 3.

French *Code Civil*, titre prélim. Art. 3.

mate surprise to find writers (*g*) of this class maintaining the proposition that a state is not obliged to cause or allow a criminal to be prosecuted, if both the offender and the offended are merely commorant within its limits, and are not subjects. Such commorant persons, however, certainly owe a temporary allegiance to the State, and are, therefore, independently of any question of maintaining public order, entitled to a temporary protection, both in civil and criminal matters, or in those which partake of the character of both, such as cases of civil damages demanded for criminal offences.

DCCCCLXXIV. The general rule, Fœlix remarks, adopted by the positive legislation of States on this subject, which is one of Public Law, is to permit the criminal prosecution of a foreigner, on account of crimes committed in another state, only in those cases in which either the state in which the prosecution is to be carried on has been in its collective capacity injured by the crime, or in which the crime has been of the gravest kind (*de la plus haute gravité*) (*h*). The effect of this rule is to make the Criminal Law of a state a *personal statute* (*i*) to its subjects, travelling with them, and inseparably attached to them, wherever they happen to be; and such is the doctrine of Paul Voet (*k*) and others. It was the opinion of Bartolus (*l*) that if, and when, a state did take cognizance of crimes committed by foreigners in a foreign state, it must proceed according to the Criminal Law of that state —"Ut possit contra eum procedi, et puniri *secundum statuta*

In Italy: *Disposizioni sulla pubblicazione, interpretazione, ed applicazione delle leggi in generale.* Art 11.

In Holland: *Wet houdende algemeene bepalingen der Wetgeving van het Koningrijk.* Art. 8.]

(*g*) *Fœlix*, s. 573.

(*h*) *Ibid.* s. 574.

(*i*) *Vide suprà*, § ccclxii.

(*k*) *De Stat.* sect. iv. c. ii. 6.

Story, s. 625.

(*l*) *Vide suprà*, note to chap. xvi. num. 47.

"*suæ civitatis*"—a proposition sufficiently impracticable, it would seem, to prove the wisdom and justice of abstaining altogether from such experiments.

DCCCCLXXV. According to the French Law contained in the 5th, 6th, and 7th articles of [the *Code d'Instruction Criminelle*,] every Frenchman [who, outside French territory, is guilty of what is technically called a "*crime*" (*coupable d'un crime puni par la loi Française*,)] may be punished by the Criminal Law of France, in France; [so may a foreigner who, either as principal or accomplice, is, outside French territory, guilty of a crime against the safety of France, or of counterfeiting her seal of State, or national current coin, public papers, or bank notes, if he is arrested in France, or if the French Government has got possession of him by extradition.

The "*délits*" of Frenchmen abroad are punishable in France only if punishable by the laws of the country where they are committed. Where a "*délit*" is committed by a Frenchman abroad against a private individual (whether French or foreign) a prosecution in France will only be instituted on official request.] In Belgium this law prevails, with the sensible addition that the family of the injured party, who may of course be murdered, may prosecute; [and with greater stringency as against Belgians guilty of offences abroad (*ll*).

The German Penal Code does not, as a general rule, regard crimes and misdemeanours (*Verbrechen und Vergehen*) committed abroad; but there are some exceptions to this rule. A German guilty in a foreign country of treasonable acts against the German Empire, or any State comprised within it, or of coining or certain other offences, is justiciable in Germany. So too in a few specified instances is a foreigner. A German, also, may be tried in Germany for any act committed in a foreign country, if it be punishable

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[(*ll*) *Complément des Codes Belges.* Procédure Pénale, Loi du 17 Avril, 1878, Arts. 6-14.]

by the laws of that country, and if by the laws of Germany it amount to a crime or misdemeanour. In this case, however, conviction or acquittal in the courts of the foreign country would be a bar to proceedings at home (*m*).]

DCCCCLXXVI. It is almost a necessary corollary, from what has been said, that the effect of a criminal sentence does not extend beyond the limits of the state in which it has been pronounced. Such is the better, if not the unanimous, opinion of jurists (*n*).

Thus a person declared infamous in his own country is infamous *de facto*, but not *de jure*, in another state. The banished man has a refuge in a state which takes no note of the sentence of exile. The confiscation of his goods in that state does not affect his property in another. To recognize this sentence as affecting either his honour or his fortune would be to inflict, as Martens observes, a second penal sentence on him (*o*).

DCCCCLXXVII. The three preceding sections have been a digression into Public from International Law; for to the former category belong the jurisprudence and practice of States with respect to their own subjects abroad.

DCCCCLXXVIII. The general principle of English

[(*m*) *Strafgesetzbuch für das Deutsche Reich*, Einleitende Bestimmungen, §§ 4, 5.

Cf. Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*), Arts. 8, 9, 10.]

(*n*) See vol. ii. Appendix ii. for remarks and cases on the refusal of Great Britain and the United States of America to take cognizance of frauds upon foreign revenue laws.

(*o*) "Par une suite de ces mêmes principes, l'effet d'une sentence criminelle ne s'étend pas, hors des limites du territoire, sur la personne ou sur les biens de celui qui a été condamné; tellement que celui qui a été déclaré infâme chez nous n'encourt chez l'étranger qu'une infamie de fait, non de droit; que le bannissement décrété dans un pays n'empêche aucun autre pays de tolérer le banni, et que la confiscation des biens prononcée dans un pays n'emporte pas celle des biens situés dans un autre . ce serait donc punir de nouveau le coupable que de le priver dans un autre pays de son honneur ou de ses biens, ou de le bannir après lui avoir accordé le séjour; ce qui toutefois exigerait une nouvelle procédure."—*Martens*, liv. iii. § 104.

Criminal Law is strictly territorial and local; even in the case of its own subjects English Common Law takes no cognizance of crimes abroad; there are, however, certain very important exceptions introduced by Statute Law.

In a very few instances the English Criminal Law (*p*) does extend its jurisdiction generally over every class of British subjects in every part of the world—viz. in cases of bigamy (*q*), treason, homicide (*r*), and slave-holding (*rr*).

As to crimes committed by a particular class of her subjects abroad, England has recently enacted as follows (*s*):

"All offences against property or person committed in "or at any place either ashore or afloat out of Her Majesty's "dominions by any master, seaman, or apprentice, who "at the time when the offence is committed is or within "three months previously has been employed in any British "ship, shall be deemed to be offences of the same nature "respectively, and be liable to the same punishments re-"spectively, and be enquired of, heard, tried, determined, "and adjudged in the same manner, and by the same "courts, and in the same places, as if such offences had "been committed within the jurisdiction of the Admiralty "of England; and the costs and expenses of the prosecution "of any such offence may be directed to be paid as in the "case of costs and expenses of prosecutions for offences "committed within the jurisdiction of the Admiralty of "England" (*t*).

(*p*) The cases [when Sir G. C. Lewis wrote his essay mentioned above had been] very few; and at p. 22 he [inferred] therefrom that the preventive effect of the statutes, certainly of 33 Hen. VIII. c. 23, [had] been inconsiderable.

(*q*) 9 Geo. IV. c. 31, s. 22, [now superseded by 24 & 25 Vict. c. 100, § 27.]

(*r*) 33 Hen. VIII. c. 23; 9 Geo. IV. c. 31, ss. 7, 8 [both now superseded by 24 & 25 Vict. c. 100, ss. 9, 10.]

(*rr*) 6 & 7 Vict. c. 98.

(*s*) 17 & 18 Vict. c. 104, s. 267 (*Merchant Shipping Act*).

(*t*) See also 6 & 7 Vict. c. 94 [the Foreign Jurisdiction Act, 1843, extended by the Foreign Jurisdiction Act, 1878, 41 & 42 Vict. c. 67.]

And with respect to crimes committed by a British subject in a foreign port, or by a foreign subject on board a British ship on the high seas, England has recently enacted as follows:—

"If any person, being a British subject, charged with "having committed any crime or offence on board any "British ship on the high seas, or in any foreign port or "harbour, or if any person, not being a British subject, "charged with having committed any crime or offence on "board any British ship on the high seas, is found within "the jurisdiction of any court of justice in Her Majesty's "dominions, which would have had cognizance of such "crime or offence if committed within the limits of its "ordinary jurisdiction, such court shall have jurisdiction "to hear and try the case as if such crime or offence had "been committed within such limits" (*u*).

DCCCCLXXIX. The doctrine of the English Law as to *Foreign penal* law has been often and most distinctly laid down by English Courts of Justice. The opinion of Lord Chief Justice De Grey (*x*) that "crimes are in their "nature local, and the jurisdiction of crimes is local," has been in substance repeated by most eminent judges (*y*); by none with greater authority and clearness than Lord Brougham in the passage already cited—"The *lex loci* must "needs govern all criminal jurisdiction from the nature "of the theory and the purpose of the jurisdiction."

DCCCCLXXX. To return to the proper subject of this chapter. With respect to the criminal prosecution of foreigners in England, it is remarkable that England, conducting all trials of this kind through the intervention of

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(*u*) 18 & 19 Vict. c. 91, s. 21 (*Merchant Shipping Act Amendment*).

(*x*) *Rafael* v. *Verest*, 2 *W. Blackstone, Rep.* at p. 1058.

(*y*) *Folliott* v. *Ogden*, 1 *H. Blackstone, Rep.* p. 135 (Lord Loughborough).

Ogden v. *Folliott*, 3 *Term Rep.* p. 733 (Mr. Justice Buller).

Wolff v. *Oxholm*, 6 *Maule & Selwyn, Rep.* p. 99 (Lord Ellenborough).

a jury, has endeavoured to secure the foreigner from suffering injustice from this peculiar institution.

DCCCCLXXXI. England, for a very long time, allowed to aliens the privilege, in civil as well as criminal cases, of challenging the array, on the ground that the sheriff had not returned a jury *de medietate linguæ* (*z*), that is, a jury one half of which consisted of aliens, supposing so many to be found in the place. The privilege, however, was finally found cumbrous; and now by s. 5 of 33 Vict. c. 14, aliens are no longer entitled to this privilege, but are triable in the same manner as if they were natural-born subjects.

DCCCCLXXXII. In England it has been decided that a foreigner charged in England with a crime committed there cannot successfully urge in his defence that he did not know he was doing wrong, though it may be a matter to be considered in mitigation of punishment (*a*).

DCCCCLXXXIII. It has been also ruled by an English Court that a foreigner sojourning in England cannot decline to produce documents, or to give evidence in an English Court of Justice, on the ground that he would by so doing expose himself to a criminal prosecution in his own country, though in England no such consequence would follow (*b*). This decision, therefore, was founded on the principle that the English Courts paid no regard to the penal laws of a foreign State.

DCCCCLXXXIV. The law and practice of England are in accordance with the law of the United States of America upon this subject (*c*). "It is conceded" (Chief Justice Marshall says) "that the legislation of every

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(*z*) Cf. *Meyer, Institutions Judiciaires*, liv. iii. ch. xiii.—Du Jury *de medietate linguæ*. *Ib.* liv. iv. ch. xvi. Juges consuls.

Maria Manning's Case, 2 *Carr. & Kir. Rep.* p. 887.

(*a*) *Rex* v. *Esop*, 7 *Carrington & Payne, Rep.* p. 456.

(*b*) *The King of the Two Sicilies* v. *Willcox*, 1 *Simons, Rep. N. S.* at p. 329 (V.-C. Cranworth). Cf. *Scoville* v. *Canfield*, 14 *Johnson*, (*N. York*) *Rep.* p. 338; cited *Story*, s. 621.

(*c*) *Story*, c. xvi. Penal Laws and Offences.

" country is territorial, that beyond its own territory it " can only affect its own subjects or citizens. It is not " easy to conceive a power to execute a municipal law, or " to enforce obedience to that law, without the circle in " which that law operates. A power to seize for the in- " fraction of a law is derived from the sovereign, and must " be exercised, it would seem, within those limits which " circumscribe the sovereign power. The rights of war " may be exercised on the high seas, because war is carried " on upon the high seas; but the pacific rights of " sovereignty must be exercised within the territory of " the sovereign.

" If these propositions be true, a seizure of a person " not a subject, or of a vessel not belonging to a subject, " made on the high seas, for the breach of a municipal " regulation, is an act which the sovereign cannot " authorize. The person who makes this seizure, then, " makes it on a pretext which, if true, will not justify the " act, and is a marine trespasser. To a majority of the " court it seems to follow that such a seizure is totally " invalid; that the possession acquired by this unlawful " act is his own possession, not that of the sovereign; and " that such possession confers no jurisdiction on the court " of the country to which the captor belongs" (*d*).

The same learned judge laid down concisely the proposition of law in another case in these words: " The " courts of no country execute the penal laws of " another" (*e*).

DCCCCLXXXV. This principle of confining criminal law within local and territorial limits, though on the whole

(*d*) *Rose* v. *Himely*, 4 *Cranch*, (*Supr. Ct.*) *Rep.* at p. 279.

(*e*) *The Antelope*, 10 *Wheaton*, *Rep.* at p. 123.

Russia, however, appears to give some effect to the convictions for crime of her own citizens by the courts of foreign nations. See *Revue du Droit International Privé*, vol. i. p. 47.

sound and wise, is not free from many disadvantages. They have been and are principally conspicuous in the cases of border population (*f*), and of crimes committed on board of foreign merchant vessels on the high seas.

It has often happened of late years that foreign vessels, on board of which, while on the high seas, some of the crew have been maimed or killed, have come into English ports. The author of the crime, perhaps the victim of it also, are on board the vessel when she arrives in the English port; in many cases the victim is placed in an English hospital (*g*); witnesses of the crime are there; the criminal law is probably in most of these cases the same; but, even if this were otherwise, it would be for the interest of every member of the commonwealth of States to assent to a modification, in such instances as these, of the principles of International Law, and to concede by special conventions a jurisdiction over the criminal to the state in whose port the vessel arrived.

It would be in most cases not a substitution of a foreign for a domestic jurisdiction, but the adoption of a foreign jurisdiction in lieu of none—in lieu of allowing an atrocious criminal to escape altogether the punishment due to his barbarity.

At present there is a practical impunity accorded to savage and brutal men, which encourages them in the commission of acts of cruelty upon the high seas at which human nature shudders; and the true end of International Law—the welfare and safety of individuals as members of States—is sacrificed to an over-scrupulous respect for a

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(*f*) See this point among others forcibly put by Sir G. C. Lewis in his Essay, pp. 30-35, and a striking illustration cited from *Villefort, Des Crimes et des Délits commis à l'Etranger.*

(*g*) "Between the 1st of June, 1857, and the 1st of June, 1858, there were admitted into the Northern Hospital at Liverpool upwards of 150 patients, whose sufferings, in every single case, were owing to maltreatment at the hands of their officers."—*The Times*, March 21, 1859, which contains a well-written article on the subject.

general principle which has ceased, in this particular instance, to be a means of maintaining that end.

A similar remark applies to the fraudulent destruction or casting away of vessels and cargoes, a crime which unhappily often escapes punishment because the country to which the ship is bound or to which the offenders come is not that to which the ship belongs, and its courts have therefore no jurisdiction.

It has been proposed, in order to meet this evil, to make these crimes, by the general consent of nations, acts of piracy and justiciable everywhere (*h*).

(*h*) *Wendt's Maritime Legislation* (ed. 2), p. 148.

[*Ibid.* (Ed. 3.) p. 646. Dr. Wendt also at pp. 648-654 of the third edition has supplied some more instances of a striking nature and of recent occurrence, showing the mischief arising from the present state of things. The opinions of German jurists, which he there cites, should also be consulted.]

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APPENDIX I. PAGES 267 AND 594.

Below is printed at length the leading American decision upon the application of Personal and Real Statutes.

SAUL *v.* HIS CREDITORS (*a*).

Appeal from the Court of the First District.

Marginal Note of Reporter.

Subsequent statutes do not repeal previous ones by containing different provisions. They must be contrary.

The jurisprudence of Spain makes a part of the Law of Louisiana.

The rules in relation to real and personal statutes apply also to unwritten laws or customs.

Where the personal statute of the domicil is in opposition to a real statute of situation, the real statute will prevail.

Contracts are governed by the laws of the country where they are made, but they cannot be enforced to the injury of a State whose aid is required to carry them into effect.

Nor where they are in opposition to the positive laws of that State.

In the conflict of laws, where it is doubtful which should prevail, the court that decides should prefer the law of its own country to that of the stranger.

Personal statutes of the country where a contract is sought to be enforced may sometimes control the personal statutes of the country where the contract was made.

The law relating to acquests and gains made during marriage is a real, not a personal statute, and governs marriages made in other countries, where the parties reside in this, as to all property acquired after their removal.

But they yield to an express agreement made on entering into marriage in another country.

The contract of pledge of incorporeal things will not give a preference unless evidenced by an authentic act, or one duly recorded

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(*a*) 5 *Martin*, (*Louisiana*) *Rep. New Series*, p. 569.

at a time not suspicious. And this contract *sous seing prive*, though made long before insolvency, cannot be recorded at a time when the debtor would be incapable of giving a preference by any act of his.

Appeal from the Court of the First District.

Porter, J., delivered the judgment of the Court. The tableau of distribution filed by the syndics of the insolvent was opposed in the court of the first instance; and the opposition being sustained, an appeal has been taken to this court by the syndics, by the Bank of the United States, the Bank of Orleans, and the Bank of Louisiana.

The claims admitted by the Judge *a quo*, and which are now contested here, are:—

1. That of the children of the insolvent, who claim as privileged creditors, for the amount inherited by them from their deceased mother.

2. That of John Jacob Astor, of New York, who avers that he is a creditor of the insolvent for the sum of $64,000, and that he has a privilege on 751 shares of stock of the Bank of Orleans, which were pledged to him, and now make a part of the estate surrendered.

3. That of Alexander Brown and Sons, of Baltimore, who also assert a privilege on bank-stock, which they state was pledged to them by the insolvent for the security of a loan of $9,000 and upwards.

The different questions of law arising on these claims have been argued with an ability worthy of their importance. Some of these questions are now presented for the first time for decision; and those which have been already before the Court and acted on, on other occasions, have been examined with so much care by the counsel, and have received such additional light from the laborious investigation bestowed on them, that they come upon our consideration with as much freshness as if this was the only time our attention had been drawn to them.

We shall take them up in the order in which they have been already stated; and first as to the claim of the insolvent's children.

From the facts admitted by the parties, which admission makes the statement on this appeal, it appears that Saul and his wife intermarried in the State of Virginia, on the 6th of February, 1794, their domicil being then in that State; that they remained there until the year 1804, when they removed to the now State of Louisiana; that they fixed their residence here, and continued this residence up to the year 1819, when the wife died; that after their removal from Virginia, and while living and having their domicil in this State, a large quantity of property was acquired, which at the death of the wife remained in the possession of her husband, the insolvent.

The children claim the one half of the property, as acquests and

gains made by their father and mother in this State. The appellants contend that, as the marriage took place in the State of Virginia, by whose laws no community of acquests and gains was permitted, the whole of the property acquired here belonged to the husband.

This statement of the matter at issue shows that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different States. Our former experience had taught us that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us that the vast mass of learning which the research of counsel has furnished leaves the subject as much enveloped in obscurity and doubt as it would have appeared to our own understandings, had we been called on to decide without the knowledge of what others had thought and written about it.

Until the discussion of this cause, it was generally understood by the bar and the bench in this State that the question now agitated was well understood in our jurisprudence; and that from the period married persons from other States moved into this, the property acquired became common, and was to be equally divided between them at the dissolution of the marriage. We have not, therefore, been insensible to the argument so strongly pressed on us that, the question being already settled by the decisions of the tribunal of last resort in the State, the subject ought not to be opened again, and that the most important interests of society require there should be a time when contested points of jurisprudence may be considered as at rest. But these considerations are not in *this* case of sufficient weight to preclude a re-examination of the principles on which the doctrine already stated has been established. A sufficient period has not elapsed to enable it to derive much authority from the acquiescence of others. The decision of the court cannot be supposed to have influenced parties entering into the marriage contract, or greatly to have affected any important interests in society. It applied only to married persons emigrating from other States, whose exertions or industry cannot be supposed to have been much changed by the anticipation of the property going in one direction or the other; whose habits were formed before they came here, and no doubt remained the same after their migration as before. We shall, therefore, proceed to the examination of the question as if the case was now presented for the first time, and, we trust, without any bias that might be supposed to exist on our minds from the opinions we have already expressed.

The investigation we are about to make will be best conducted by first examining our own statutes.

The old Civil Code provided that every marriage contracted within this State superinduces of right partnership or community of acquests and gains. (Civil Code, 336, art. 63.)

Our Revised Code repeats this provision and adds another: that a marriage contracted out of this State between persons who afterwards come to live here is also subject to the community of acquests with respect to such property as is acquired after their arrival. (Code, 2370.)

If the acquests and gains, in respect to which the present suit exists, had been made under the dominion of the law last cited, there would be an end to any dispute about their distribution; but the marriage of the insolvent and his wife was dissolved by the death of the latter before that law was enacted.

It has been contended that, as the article first cited provides for a community of acquests and gains on all marriages contracted *within* the territory, it is an evidence the legislature did not intend there should be a community on marriages made *without*; *inclusio unius est exclusio alterius.*

It would be giving too much weight to the argument *contrario sensu* to adopt this construction. If the subject were one on which there had existed no previous legislation, it would certainly be fair to contend that, as the law-maker has affirmatively declared particular cases not enumerated should produce certain effects, this affirmative included the negative, that other cases not enumerated should not produce these effects; though even then this reasoning, which is founded on presumption, might yield to other circumstances, by which that presumption could be repelled. But when there already exists positive legislation on the same subject-matter providing for the very case which it is presumed is excluded, the argument loses almost entirely its weight. The law must then be interpreted by a well-known rule of jurisprudence, that an intention to repeal laws can never be supposed; that subsequent statutes do not abrogate former ones by containing *different* provisions on the same subject; they must be *contrary* to produce such effects. This rule, which is true in relation to all laws, is more particularly applicable to our codes, which were only intended to lay down general principles, and provide for cases of the most common occurrence. If, then, the provisions in our code cannot be considered to have repealed the former law, no argument can be drawn from them as to the intention of the legislature to do so, or their opinion on this subject. It is more than probable their thoughts were not turned to a case which is not of frequent occurrence. If they had intended to act on it, as the matter was, to say at least, doubtful, they certainly would not have increased these doubts by leaving their will to be inferred from an affirmative regulation on the same subject, but in relation to a different state of things. We are bound to believe they would have legislated directly on it, and have positively declared, as they have since done, what the rule should be when people married in another country and removed into this.

It being clear, then, that our own statutes furnish no guide for the

decision of this question, recourse must be had to the former laws of the country.

The positive regulations of Spain on this subject are contained in two laws: one of the *Fuero Real*, and the other of the *Partidas*.

That part of the law of the *Partidas* which directly applies to the case before the Court is in the following words:—"E dezimos, "que el pleyto que ellos pusieron entre si, deve valer en la manera "que se avinieron ante que casassen, o quando casaron; e non deve "ser embargado por la costumbre contraria de aquella tierra do "fuesen a morar. Esso mismo seria, maguer ellos non pusiessen "pleyto entre si; ca la costumbre de aquella tierra do fizieron el "casamiento, deve valer, quanto en las dotes, e en las arras, e en las "ganancias que fizieron, e non la de aquel lugar do se cambiaron." —P. iv. tit. 11, ley 23.

"And we say, that the agreement they had made before or at the "time of their marriage ought to have its effect in the manner they "may have stipulated, and that it will not be avoided by the custom "of the place to which they may have removed. And so we say it "would be, if they had not entered into an agreement; for the cus- "tom of the country where they contracted the marriage ought to "have its effect as it regards the dowry, the *arras*, and the gains they "may have made, and not that of the place to which they may "have removed."

Some verbal criticism has been exercised on this law. It is contended by one of the parties that it only intended to provide for the gains made before the removal of the married couple; or, at all events, that the words used leave the sense doubtful. By the other, that it regulates all, whether made before or after they left the country in which the marriage took place. The expressions used, though not free from all ambiguity, as the appellants have argued, we think ought to receive the construction for which they contend. The law was so understood by the commentators of that day, and the preceding parts of it, compared with the clause in which the obscurity is said to exist, serve to support this interpretation.

If these provisions in the *Partidas* stood alone, they would admit of a more favourable contruction in support of the ground assumed by the counsel for the syndics than they can receive when taken in connexion with the law of the *Fuero Real*, which is in the following words:—

"Toda cosa que el marido y muger ganaren o compraren, estando "de consuno, hayanlo ambos por medio, &c."—*Novissima Recop.* lib. x., tit. iv. ley 1.

"Everything which the husband and wife may acquire while "together shall be equally divided between them."

The codes in which these laws are found were composed under the authority of Ferdinand the Third and his son Alphonso the

Wise, nearly about the same time. The *Fuero Real* was published in the year 1255. The *Partidas*, although completed in 1260, was not promulgated until nearly a century afterwards.

By the Spanish writers the former is considered, with respect to the latter, what the Institutes of Justinian are to the Pandects; and it has been admitted that they may mutually aid in the interpretation of each other.

We have then two statutes presented for construction, one of which, not in terms the most clear, directs that the custom of the country where parties contract marriage should regulate their rights in respect to acquests and gains; and another which declares that everything that husband and wife may gain or purchase shall be equally divided between them.

If the question as to the true interpretation of these laws now arose for the first time, we should hesitate what construction to put on them. Either, taken singly, and according to the letter, goes the whole length for which each of the parties before us contends; but before examining them to ascertain what conclusion we should come to, if left to our judgment unaided by the opinions of others, it is proper we should endeavour to learn what construction was put on them in the country where they were made. On whatever side the weight of authority should be found to preponderate, we may certainly adopt it. They who have had these laws for nearly five hundred years before they passed to us must, we feel, have more knowledge of the intention and meaning of their own legislation than we at this remote period of time, who have come to a knowledge of them but, as it were, of yesterday, can possibly possess.

Nothing can be more satisfactorily shown than the opinion of the commentators on the statutes of Spain in relation to this particular subject. From the time Gregorio Lopez published his work on the *Partidas*, in the year 1555, down to Febrero, in the year 1781, the writings of no jurist of that country have been produced to us who treats of this matter that does not declare that the law of the *Partidas*, already cited, must be limited to property acquired in the place where the marriage is contracted, and that it does not extend to acquisitions made in another country, to which the parties may have removed, where a different rule should prevail. In the long list of writers who have been cited in support of this doctrine are to be found some of the most illustrious of whom the Middle Ages could boast—James of Arena, Gulielmus de Cuneo, Dynus, Raynaldus, Jean Favre, Baldus, Alciat, and Ancharanus, Gregorio Lopez on the four *Partidas*, tit. xi., law 24; Matienzo, Commentaria, lib. v. tit. ix. nos. 73 & 74; Febrero, p. ii. lib. i. cap. 4, s. 2, no. 62.

Trying the question, therefore, by authority, no doubt can exist on which side it preponderates in the country where the statute was passed. Admitting, therefore, for a moment, that the letter of the law of the *Partidas* was violated by the construction given to it by

the commentators, that violation acquiesced in for centuries, by lawyers, courts, and the sovereign authority of the country, makes as much a part of the law of Spain at this day as if the statute had been modified by the power in the State in whom the right of legislation was vested. In looking into the laws of any country, we stop at the threshold if we look no further than their statutes; and what we should see there would in most instances only tend to mislead. In every nation that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, a more extensive and equally important part of the rules which govern men is derived from what is called, in certain countries, common law, and here, jurisprudence.

This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others it is furnished by private individuals eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means: that of reason alone. After a long series of years, it is sometimes difficult to say whether these opinions and judgments were originally the *effect* of principles previously existing in society, or whether they were the *cause* of the doctrines which all men at last recognize. But whether the one or the other, when acquiesced in for ages, their force and effect cannot be distinguished from statutory law. No civilized nation has been without such a system. None, it is believed, can do without it; and every attempt to expel it only causes it to return with increased strength on those who are so sanguine as to think it may be dispensed with.—*Duponceau on Jurisdiction*, 105.

Spain, who was among the first of the European nations that reduced her laws into codes, and who carried that mode of legislation further than any other people, early felt the necessity of a jurisprudence which would supply the defects and soften the asperities of her statutes. The opinions of her jurisconsults seem to have obtained an authority with her, of which the history of no other country offers an example. So early as the fifteenth century a law was passed regulating the authority which belonged to the opinions of Bartolus, Baldus, Juan Andrea, and Abad. That law was, it is true, afterwards repealed by the first of *Toro*, and directions given that, in case of doubt as to the true interpretation of the statutes, recourse should be had to the sovereign himself. What was the practical operation of this last statute our researches do not enable us positively to state. It does not, however, seem to have made much change in the practice of their courts, for in the year 1713 we find an *auto accordado* in respect to the laws that should be followed in the decision of causes, in which it is stated, as a great inconvenience, that the tribunals of justice *had resorted to foreign books and authors*, to the depreciation of *their own jurists*, who, with great knowledge, had explained and

interpreted their laws, ordinances, and customs. But admitting that, after the promulgation of the law of *Toro*, the opinions of these jurists had not the weight they before received, and that in all unsettled cases recourse was had to the sovereign himself; when we find that, nearly four hundred years after, the writers on the laws of Spain refer to no decision of their king and council on this point, express no doubt about it, and quote the opinions of jurists who wrote nearly the same length of time before them, what conclusion can we come to but that *no doubt did exist on the subject in Spain*? That the whole nation acquiesced in the opinions of those who had early interpreted their statutes, and that the tacit consent of the sovereign himself must be presumed given to a construction which he had the power to change, but in which it is not shown he made any alteration.—*Novissima Recop.* l. iii. tit. ii leyes 3 & 11.

It is most clear, then, that this interpretation, which limits the law of the *Partidas* to the gains made in the country where the marriage was contracted, and excludes from its operation property acquired after a change of residence, comes to us recommended and fortified by every sanction that can give it value in the minds of those who sit in judgment, and whose duty it is to pronounce what the law is, and not what it ought to be.

The appellants, however, contend that, although such may be the construction given to the statute in Spain, that construction is not binding on the Court, because this is a question of jurisprudence not peculiar to any distinct nation, but one touching the comity of nations, and embracing doctrines of international law, on which the opinions of writers not living in Spain are entitled to equal weight with those who professedly treat of her laws.

The strength of the plaintiffs' case rests mainly on this proposition, and it is proper to examine it with the attention which its importance in the cause requires.

But though of importance, it is not of any difficulty. By the comity of nations, a rule does certainly exist that contracts made in other countries shall be enforced according to the principles of law which govern the contract in the place where it is made. But it also makes a part of the rule that these contracts should not be enforced to the injury of the State whose aid is required to carry them into effect. It is a corollary flowing from the principle last stated, that where the positive laws of any State prohibit particular contracts from having effect, according to the rules of the country where they are made, the former should control. Because that prohibition is supposed to be founded on some reason of utility or policy, advantageous to the country that passes it; which utility or policy would be defeated if foreign laws were permitted to have a superior effect. On the very subject-matter now before us, the writers who treat of it, although disputing about almost everything else, agree in stating that a *real statute*, that is, one which regulates property within the limits of the

State where it is in force, controls *personal* ones, which follow a man wherever he goes; indeed it has been expressly and with great propriety admitted in argument that where the personal statute of the domicil is in opposition to a real statute of situation, the real statute will prevail.—*Boullenois, Disc. Prélim.* P. 21, *ib. des Demis. quest.* 6. 163; *Bcuhier sur la Coutume du Duché de Bourgogne*, cap. xxiii. 461; *Rodenburgh de Statutor. diversit.* tit. ii. cap. v. no. 6.

If this be true, the question whether the opinions of foreign jurists shall control those of the country where the statute is passed, is at once settled. If the right of a nation to pass the statute which will affect a contract made in another country be admitted, the right cannot be contested to her to say whether she has done so or not. She is surely the best and safest expounder of her own laws. And we repeat here what we said a few days since, on nearly the highest authority to which we could refer—"That no court on earth that "professed to be governed by principle would, we presume, under-"take to say that the courts of Great Britain, or France, or any other "nation, had misunderstood their own statutes, and therefore erect "itself into a tribunal by which that misunderstanding was to be "corrected."—10 *Wheaton*, 159.

And if we did recur to the jurists of France and Holland for information, what would we get in place of the well-established rules in Spain? Much to confuse and little to enlighten us. We should find great learning and ingenuity exercised by some to show that the law which regulates the rights of property among married persons is a *personal one*, which follows the parties wherever they go. By others, that it is *real*, and limited to the country by which it is made. But not one of them denies the power in a nation to pass a law, such as has been lately enacted by the State of Louisiana, that a married couple moving into it from another State shall be governed by her laws as to their future acquisitions. None of them professes to comment on the laws of Spain, which her jurists say have the same effect with our late statute. They are not even mentioned by them. How wholly unsatisfactory, therefore, any general reasoning must be on different customs and usages, to prove that the law of the *Fuero* is a *personal* and not a *real* statute, we need not say.

With this view of the subject we might conclude, but as it is always satisfactory for this court to feel that the authority which governs it is founded in truth, we shall proceed to examine the grounds on which the opinions of the Spanish jurists have been so strongly assailed. In doing so, we are led into an examination of the doctrine of real and personal statutes, as it is called by the continental writers of Europe; a subject the most intricate and perplexed of any that has occupied the attention of lawyers and courts; one on which scarcely any two writers are found to entirely agree, and on which it is rare to find one consistent with himself throughout We know of no matter in jurisprudence so unsettled, or none

that should more teach men distrust for their own opinions and charity for those of others.

Holland and France appear to be the countries where the greatest number of these questions have arisen, and where the subject has excited most attention. The doctrine which they denominate that of real and personal statutes is not, as it might, from the terms used, be supposed, confined to written and positive law; but is applied also to unwritten laws or customs, by which the state or condition of man is regulated, his contracts governed, or his property distributed at his death. It professes to furnish the rules which are to govern men in civil matters when they pass from one country to another, and to distinguish and decide in all cases, where the law of domicil and that of origin differ; where the rules of the place of contract and its execution conflict; where the countries in which a marriage is contracted and dissolved have different regulations; or where, on the decease of the owner, his property is situated in several places having different rules as to its distribution.

According to the jurists of those countries, a personal statute is that which follows and governs the party subject to it wherever he goes.

The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority.

The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove:

But it is subject to a real statute of the place, where the person subject to the personal should fix himself, or where the property on which the contest arises may be situated.

So far the rules are plain and intelligible; but the moment we attempt to discover from these writers what statutes are real and what are personal, the most extraordinary confusion is presented. Their definitions often differ, and when they agree on their definitions they dispute as to their application.

Bartolus, who was one of the first by whom this subject was examined, and the most distinguished jurist of his day, established as a rule that whenever the statute commenced by treating of persons, it was a personal one; but if it began by disposing of things, it was real. So that if a law, as the counsel for the appellants has stated, was written thus: "The estate of the deceased shall be inherited by the eldest son," the statute was real; but if it said, "The eldest son shall inherit the estate," it was personal.

This distinction, though purely verbal and most unsatisfactory, was followed for a long time, and sanctioned by many whose names are illustrious in the annals of jurisprudence; but it was ultimately discarded by all. D'Argentre, who rejected this rule, to real and personal statutes added a third, which he called mixed. The real statute, according to this writer, is that which treats of immovables

—*In quo de rebus soli, id est immobilibus, agitur*; and the personal, that which concerns the person abstracted from things—*Statutum personale est illud quod afficit personam universaliter, abstracte ab omni materia reali.* The mixed he states to be one which concerns both persons and things.

This definition of D'Argentre of a personal statute has been adopted by every writer who has treated of this matter. A long list of them, amounting to twenty-five, is given by Froland, in his *Mémoires concernans la Qualité des Statuts*, among which are found *Burgundus, Rodenburgh, Stockmans, Voet, and Dumoulin. Froland, Mémoires concernans la Qualité des Statuts*, chap. v. no. i.

But the definition which he has given of a real statute does not seem to have been so generally adopted. It was, however, followed by *Burgundus, Rodenburgh, and Stockmans.*

Boullenois, who is one of the latest writers, attacks the definitions given by D'Argentre, and, as he supposes, refutes them; he adds others, which appear to be as little satisfactory as those he rejects. He divides personal statutes into personal particular, and personal universal; personal particular he subdivides again into pure personal and personal real.—*Boullenois, Traité de la Personalité et de la Réalité des Lois*, tit. i. cap. ii. obs. 4.

Voet has two definitions: one, that a real statute is that which affects principally things, though it also relates to persons, and the other, that a personal statute is that which affects principally persons, although it treats also of things.

It would be a painful and a useless task to follow these authors through all their refinements. President Bouhier, who wrote about the same time as Boullenois, and who has treated the subject as extensively as any other writer, after quoting the definitions just given and others, says that they are all defective, and that he cannot venture on any until the world are more agreed what statutes are real and what are personal. While they remain so uncertain, he thinks the best way is to follow the second definition of Voet, which is—"That a real statute is that which does not extend be-"yond the territory within which it is passed, and a personal is that "which does."—*Bouhier sur les Coutumes de Bourgogne*, chap. xxiii. no. 59.

This last mode of distinguishing statutes, which teaches us what effect a statute should have by directing us to inquire what effect it has, is quite as unsatisfactory as the rule given by Bartolus, who judged of it by the words with which it commenced.

The rules given by Chancellor d'Aguesseau are perhaps preferable to any other. "That," says he, "which truly characterises "a real statute, and essentially distinguishes it from a personal one, "is not that it should be relative to certain personal circumstances, "or certain personal events; otherwise we should be obliged to say "that the statutes which relate to the *paternal power, the right of*

" *wardship, the tenancy by courtesy* (droit de viduité), *the prohibi-*
" *tion of married persons to confer advantages on each other*, are
" personal statutes; and yet it is clear in our jurisprudence that
" they are considered as real statutes, the execution of which is
" regulated, not by the place of domicil, but by that where the
" property is situated.

" The true principle in this matter is, to examine if the statute
" has property directly for its object, *or its destination to certain*
" *persons, or its preservation in families*, so that it is not the interest
" of the person whose rights or acts are examined, but the interest
" of others to whom it is intended to assure the property, or the real
" rights which were the cause of the law. Or if, on the contrary,
" all the attention of the law is directed towards the person, to
" provide in general for his qualifications, or his general and ab-
" solute capacity, as when it relates to the qualities of major or
" minor, of father or of son, legitimate or illegitimate, ability or
" inability to contract, by reason of personal causes.

" In the first hypothesis the statute is real, in the second it is
" personal, as is well explained in these words of D'Argentre :—
" ' Cum statutum non simpliciter inhabilitat, sed ratione fundi aut
" ' juris realis alterum respicientis extra personas contrahentes totas,
" ' hanc inhabilitatem non egredi locum statuti.'"—*Œuvres d'Agues-*
seau, vol. iv. 669, *Cinquante-quatrième Plaidoyer.*

This definition is, we think, better than any of the rest, though even in the application of it to some cases, difficulty would exist. If the subject had been susceptible of clear and positive rules, we may safely believe this illustrious man would not have left it in doubt, for if anything be more remarkable in him than his genius and his knowledge, it is the extraordinary fullness and clearness with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far—to define and fix that which cannot in the nature of things be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances, which cannot be reduced within any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must be often a matter of doubt which should prevail, and that, whenever that doubt does exist, the court

which decides will prefer the law of its own country to that of the stranger.

These principles may be in part illustrated by one or two examples that we presume will receive general assent.

The writers on this subject, with scarcely any exception, agree that the laws or statutes which regulate minority and majority, and those which fix the state and condition of man, are personal statutes, and follow and govern him in every country.

Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one, no objection could be, perhaps, made to the rule just stated, and it may be, and we believe would be, true that a contract made here at any time between the two periods already mentioned would bind him.

But reverse the law of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one, that twenty-five was the period at which a man ceased to be a minor in the country where he resided, and that at the age of twenty-four he came into this State and entered into contracts; would it be permitted that he should in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge; and would we tell them that ignorance of foreign laws in relation to a contract made here was to prevent them enforcing it, though the agreement was binding by those of their own State? Most assuredly we would not.—4 *Martin*, 193.

Take another case. By the laws of this country slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts, would their courts sustain the argument that this state or condition was fixed by the laws of his domicil of origin? We know, they would not.

These examples might be multiplied, but they are sufficient to explain the ideas of this court, that it is almost impossible to lay down any general rule on the subject, and that even the personal statutes of one country may be controlled by those of another.

From the various definitions already cited, it may be easily supposed that a vast diversity of opinion existed in their application to the contract of marriage. Both in France and Holland it has been a subject of great contention, the courts and parliaments of different provinces deciding it differently; some of them considering the law which regulates the rights of parties in the country where the marriage takes place as real, some as personal.

An examination of the different treatises on this subject has convinced us that the greater number of the lawyers of those countries are of opinion that in settling the rights of husband and wife, on the dissolution of the marriage, to the property acquired, the law of the

place where it was contracted, and not that where it was dissolved, must be the guide. Such was the jurisprudence of the Parliament of Paris. It was the opinion of Dumoulin, of Boullenois, of Rodenburgh, of Le Brun, of Froland, of Bouhier, of Stockmans, of Pothier, and it is that of Merlin. On the other side are found D'Argentre, Cravette, Everard, Vandermeulen, the Parliament of Rouen, the Supreme Court of Brabant, and that of Metz.

But it is evident, the opinions of the greater number of those who think that on the dissolution of the marriage the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by them is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

It is particularly worthy of remark that Dumoulin, the founder of this system, was of opinion that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments, and it appears supported by quotations which he makes from his works. —*Boullenois, Traité de Personalité et de Réalité des Lois*, obs. 29, pp. 740, 757, 758.

Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape; but to our judgment it is quite unsatisfactory.

Admitting it for a moment to be true that when parties married there was a tacit contract between them, their rights to property subsequently acquired should be governed by the laws of the country where the marriage took place; that tacit agreement would still be controlled by the positive laws of any country into which they might remove. This is admitted by Dumoulin himself, who, after treating of the tacit agreement, and stating that the statute is not legal but conventional—*Statutarium proprie non est nec legale, sed conventitium*—adds, such tacit convention cannot have this effect in another place where there exists a contrary statute, which is absolute and prohibitive—*alias si statutum esset absolutum et prohibitorium, non obstantibus pactis factis in contrarium ; tunc non haberet locum ultra fines sui territorii.—Dumoulin on the first book of the Code, verbo conc. de stat. et consuet., loc. Froland, Mémoires sur les Statuts, chap.* 4, 63 [cap. iv. p. 63—see p. 824 *ad fin.*].

If such be the consequence where the statute is prohibitive, we do not see why the same result should not follow from a *real statute*, which regulates things within the limits of the country where it is in force. The reason for both is the same—namely, that the laws of the country where the contract is sought to be enforced are opposed to it. Why the one should have effect and the other should not, we profess to be unable to distinguish. It may be a question whether the statute is real or not; but the moment it is admitted to be so, it regulates all property acquired within its authority; then, according to the principles of Dumoulin, the tacit agreement can no more control it than it could the law which positively forbade such tacit agreement from having effect. So that, even admitting this tacit agreement, we are brought back to the point from which we started; that is, whether the law regulating the right of husband and wife be real or personal?

But, without agreeing with those who have treated the idea of Dumoulin as one purely of the imagination, we think that he gives to this tacit consent a much more extended effect than it is entitled to; that in supposing, when parties marry, they intend the laws of the place where the contract is made should govern them wherever they go, *he begs the question*; and that the first thing to be settled is, whether these laws do govern them wherever they go.

We are now treating, let it be remembered, of a case such as that before us, where there is no express contract; and the argument is that, the parties not having entered into an express agreement, the presumption must be they intended their rights to property should be governed by the laws of the country where they married. This is admitted. But then this presumption as to their agreement cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the State where they were passed, then it cannot be true to suppose the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted, if it was real and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so; and they are presumed to have contracted in relation to the law, such as it was, to *have known its limitations* as well *as its nature*, and to have had the one as much in view as the other. If the law of Virginia should have been, that for twenty years the acquisitions made by the parties belonged to one of them, and they married without an express stipulation to the contrary, they would be presumed to have contracted in reference to this *limitation of time*. If, on the contrary, the law is *limited as to place*, the tacit agreement which is founded on a supposed consent that the law should govern them must be considered to have that limitation in view. In one word, the parties are presumed to have

agreed that the law should bind them as far as that law extended, but no further. So that this doctrine brings us back again to the inquiry, was the statute real or personal? Did it extend beyond the limits of the country where the marriage took place, or did it not? Whichever it may be found to be, the parties must be supposed to have contracted. In the absence of anything *expressed* to the contrary, we cannot *presume* they intended to enlarge or restrain the operation of the law.

The most familiar way of treating this idea of tacit contracts being made in relation to the laws of the country where they are entered into is to say that the agreement is to be construed the same way as if those laws were inserted in the contract. Now, supposing parties to marry in Louisiana, and that our statute providing for the community of acquests and gains is real and not personal; that it divides the property acquired while in this State equally between the husband and wife, but does not regulate that which they gain in another country to which they remove; the insertion of this law in a contract would be nothing more than a declaration that while residing *within this State* there should be a community of acquests and gains. An agreement such as this could not have the same force as an express one by which the parties declared there should be a community of acquests and gains *wherever they went*; for the one has no limitation as to place, and the other has. The maxim, therefore, which was so much pressed on us in argument, *taciti et expressi eadem vis*, is only true where the law to which the tacit agreement refers contains the same provisions as the written contract.

It was evidently on this distinction the cases of *Murphy* v. *Murphy* and *Gales* v. *Davis's heirs* were differently decided in this court. In the former there was an express contract that there should be a community of acquests and gains between the parties, *even though they should reside in countries where different laws might prevail.* In the latter there was no express agreement, and the parties were not presumed to have made a tacit one contrary to the law of the place where they married. They were not supposed to have agreed that a real statute, which governed them only while there, was to follow them as a personal one, and regulate their property in another State. If principles so plain required any authority, we would find it in the very author on whom the appellants principally rely. Dumoulin, after stating that the tacit contract will be controlled by a law that is contrary to it, in the country where the marriage is dissolved, adds: that it will be different where the agreement is express: "Nisi expresse de tali "lucro conventum fuisset, quia pactio bene extenditur ubique, sed "non statutum mere."—*Froland, Mémoires sur les Statuts*, cap. iv. p. 63.

Having thus stated the reasons why this doctrine of a tacit con-

tract cannot be admitted by us to the extent pressed by the counsel, it only remains for us to examine whether the law of the *Fuero* was a real or personal statute. We consider it real. It appears to us to relate to things more than to persons; to have, in the language of D'Aguesseau, the destination of property to certain persons, and its preservation in families, in view. It gives to the wife and her heirs the one half of that which would otherwise belong to the husband. Boullenois, who rejects Dumoulin's idea of a tacit agreement, says the statute which regulates the community is a personal one, because it fixes the state and condition of the spouses; and he goes so far as to declare, that if his adversaries will not allow this doctrine to be correct, then the statute is real, for on no other ground can it be considered personal. We think the state and condition of both husband and wife are fixed by the marriage in relation to everything but property, independent of this law; and, as it regulates property alone, it is not a personal statute.—*Boullenois, Traités des Statuts*, cap. v. obs. 29, p. 751; cap. ii. obs. 5, 80.

Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. We know of no question better settled in Spanish jurisprudence; and what is settled there cannot be considered as unsettled here. The jurisprudence of Spain came to us with her laws. We have no more power to reject the one than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence as the subjects of Spain have, except so far as the genius of our government or our positive legislation has changed it. How the question would be decided in that country, if an attempt were made there on the authority of the French and Dutch courts and lawyers to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say. The question is sufficiently answered by the *auto* already cited, in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated and forbidden.

We conclude, therefore, that a community of acquests and gains did exist between the insolvent and the mother of the appellees, from the time of their removal into this State, and that the court below committed no error in placing them on the *bilan* as privileged creditors, for the amount of those acquests which remained in their father's possession at the dissolution of the marriage.

[APPENDIX II. (PAGE 305.)

(From 'The London Gazette,' April 23, 1886.)

Foreign Office, April 21, 1886.

Mixed Marriages in the United Kingdom between British Subjects and French Citizens :—

The following Agreement has been entered into between the British and French Governments.

Sir J. Walsham to Earl Granville.

(Extract.)

Paris, October 9, 1884.

M. Ferry requests me to forward to your Lordship the accompanying draft of the complete text of the certificate as it has been agreed upon at different periods by the two Governments.

His Excellency adds that, should Her Majesty's Government accept this text as definitive, the Government of the Republic will be ready to extend to the agreement the character of a diplomatic arrangement.

I have shown the draft certificate as it now stands to the legal adviser of Her Majesty's Embassy, and M. Treitt assures me that it ought, in its present form, to constitute a satisfactory guarantee against a repetition of the disastrous consequences which have hitherto not unfrequently been the result of these mixed marriages.

M. Ferry to Sir J. Walsham.

Paris, le 7 Octobre, 1884.

M. LE MINISTRE,—Par une lettre en date du 8 Août dernier, M. l'Ambassadeur de Sa Majesté Britannique à Paris m'avait fait connaître les modifications que le Gouvernement de la Reine désirait voir apporter au texte du paragraphe C du certificat que les Consuls de France en Angleterre pourraient être autorisés à délivrer à l'occasion de mariages mixtes entre Français et Anglais.

M. le Ministre de la Justice, à qui j'avais donné connaissance de

cette communication, m'informe qu'en ce qui le concerne, il est disposé à donner son approbation à la nouvelle rédaction soumise à l'examen de son Département.

J'ai l'honneur, en vous faisant part de la réponse le M. le Garde des Sceaux, de vous transmettre ci-joint copie du texte complet du certificat dont il s'agit, tel qu'il résulte de l'accord intervenu à diverses reprises entre les deux Gouvernements.

Je vous serai obligé de vouloir bien communiquer ce document au Principal Secrétaire d'Etat de Sa Majesté Britannique, et l'informer que s'il approuve cette rédaction définitive, le Gouvernement de la République est tout disposé à consacrer cette entente par un arrangement diplomatique.

Agréez, &c.,

(Signé) JULES FERRY.

Draft of Consular Certificate to be issued by French Consuls in cases of Marriage in the United Kingdom between British Subjects and French Citizens.

Le Consul de France à déclare :—

1. Que les Français ne peuvent se marier sans avoir, préalablement, fait en France les publications légales de leur mariage, et obtenu le consentement de leurs parents ou des autres personnes indiquées par la loi ;

2. Que des pièces et documents produits :—

(A.) Il résulte que M. (nom, prénoms et profession), né à , le demeurant à , et qui se propose de contracter mariage avec M. (nom, prénoms et profession), né à , le , demeurant à , est de nationalité Française ;

(B.) Que les publications de son futur mariage prescrites par la loi de France ont été régulièrement faites aux domiciles spécifiés par la loi ;

(C.) Que le futur époux a produit les pièces (indiquer ces pièces) qui établissent, soit qu'il a obtenu pour son mariage le consentement des parents ou d'autres personnes dont le consentement est exigé ; soit que les parents dont le consentement eût été nécessaire sont décédés, soit que des actes respectueux ont été signifiés aux parents, lesquels actes suppléent à leur consentement (le Consul pourrait indiquer ici de quelles personnes le consentement émane) ;

(D.) Qu'aucune opposition à ce mariage ne s'est produite jusqu'à ce jour, et que s'il ne s'en révèle pas jusqu'au moment de la célébration du mariage, les époux seraient admis à contracter mariage en France.

Le Consul déclare, en outre, que le mariage contracté en pays étranger, entre un Français et un étranger, est valable s'il a été célébré conformément aux lois du pays, et à la condition :—

1. Que les publications légales en France et les consentements exigés par la loi aient précédé le mariage (Articles 148 à 159 du Code Civil).

2. Que les futurs époux aient l'âge requis par la loi : 18 ans pour le futur, et 15 ans pour la future (Article 144 du Code Civil).

3. Que le consentement de chacun des deux époux ait été absolument libre (Article 146 du Code Civil).

4. Que l'un des époux ne soit pas dans les liens d'un précédent mariage (Article 147 du Code Civil).

5. Que le mariage projeté ne viole pas les défenses de mariage entre parents et alliés au degré prohibé (Articles 161 à 163 du Code Civil).

Le Consul déclare encore que l'étrangère qui épouse un Français devient Française par le fait seul de son mariage, et que les enfants issus du mariage, même nés en pays étranger, sont Français (Articles 12 et 312 du Code Civil).

En foi de quoi, nous avons délivré le présent certificat pour valoir ce que de raison.

Draft of Certificate to be issued by French Consuls in cases of Marriage in the United Kingdom between British Subjects and French Citizens.

(Translation.)

The French Consul at declares :—

1. That French (citizens) cannot contract marriage without having previously published, in France, the notices of their marriage, and obtained the consent of their parents, or of other persons, as prescribed by law ;

2. That from the papers and documents produced :—

(*a*) It results that M. (*insert surname, Christian names, and calling*), born at , on the , residing at , who proposes to contract marriage with (*insert surname, Christian names, and calling*), born at , on the , residing at , is of French nationality ;

(*b*) That the notices of his (her) intended marriage, prescribed by the Law of France, have been duly published at the domicils specified by law ;

(*c*) That the intended husband has produced the papers (*here note them*) which establish, either that he has obtained for his marriage the consent of the parents, or other persons whose consent is required, or that the parents whose consent would have been necessary are deceased, or that " respectful summonses " have been

notified to the parents, which summonses serve instead of their consent. (*The Consul may note here from what persons the consent emanates.*)

(*d*) That no opposition to this marriage has been raised up to this date, and that if none be offered up to the moment of the celebration of the marriage, the parties would be competent to contract marriage in France.

The Consul declares, moreover, that marriage contracted in a foreign country between a French citizen and a foreigner is valid if it has been celebrated in accordance with the laws of the country, and provided:—

1. That the legal notices in France and the (notifications of) consent exacted by law have preceded the marriage (Arts. 148 to 159 of the Civil Code).

2. That the parties to the intended marriage be of the age required by law, *i.e.* 18 years for the bridegroom and 15 years for the bride (Art. 144 of the Civil Code).

3. That the consent of each of the parties have been absolutely free (Art. 146 of the Civil Code).

4. That neither of the parties be bound by a previous marriage (Art 147 of the Civil Code).

5. That the intended marriage do not violate the prohibitions of marriage between relations within the forbidden degrees (Arts. 161 to 163 of the Civil Code).

The Consul also declares that a foreign woman marrying a Frenchman becomes French through the sole fact of her marriage, and that the children, issue of the marriage, even when born in a foreign country, are French (Arts. 12 and 312 of the Civil Code).

In faith of which we have issued the present certificate, to be of all reasonable force and effect.

Earl Granville to Viscount Lyons.

Foreign Office, October 17, 1884.

My Lord,—I have to request that your Excellency will express to the French Government the satisfaction with which Her Majesty's Government have received the text of the Consular certificate to be issued in cases of marriage in this country between British subjects and French citizens, which is inclosed in Sir J. Walsham's despatch of the 9th instant, and which meets with their full concurrence as now amended.

I should be glad if your Excellency would, at the same time, whilst expressing the acknowledgments of Her Majesty's Government for the courtesy shown by the French Government in this matter, ascertain whether they propose to issue instructions at once to their Consuls in the sense agreed upon, and, if so, at what precise

date, it being desirable that publicity should be simultaneously given in this country to the arrangement. I am, &c.,

(Signed) GRANVILLE.

M. Ferry to Viscount Lyons.

Paris, le 23 Décembre, 1884.

M. L'AMBASSADEUR,—Par une lettre en date du 8 de ce mois votre Excellence a bien voulu m'exprimer, au nom de son Gouvernement, le désir de connaître la date des instructions que le Gouvernement de la République doit, conformément à l'accord intervenu avec le Gouvernement de Sa Majesté Britannique, adresser aux Consuls de France en Angleterre relativement au certificat à délivrer par eux lors de mariages mixtes entre Français et Anglais.

Je m'empresse de vous informer, M. l'Ambassadeur, qu'à la date de ce jour j'ai transmis aux Agents Consulaires de France dans le Royaume-Uni une Circulaire accompagnant le certificat dont il s'agit et les invitant à établir, sur ce modèle, les pièces de cette nature qu'ils auraient à délivrer.

Je prie votre Excellence de vouloir bien en donner connaissance à son Gouvernement, qui jugera sans doute à propos d'informer les autorités compétentes en Angleterre de l'arrangement intervenu.

Agréez, &c.,

(Signé) JULES FERRY.]

BELGIUM.

[N.B.—As to *Marriages with Belgians*, see a Memorandum issued in 1888 by the Home Office, giving the modifications recently introduced into the Marriage Laws of Belgium.—*London Gazette*, 1888, page 2631.

See, too, the Belgian *Loi du* 20 *Mai* 1882, now substituted for Art. 170 of the *Code Civil*. It deals with marriages contracted by Belgians in a foreign country with either Belgians or foreigners.]

[APPENDIX III.

INTERNATIONAL CONVENTIONS (*Page* 469, *Page* 463).

COPYRIGHT.

Convention concerning the Creation of an International Union for the Protection of Literary and Artistic Works. (*a*)

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the German Emperor, King of Prussia; His Majesty the King of the Belgians; Her Majesty the Queen Regent of Spain, in the name of His Catholic Majesty the King of Spain; the President of the French Republic; the President of the Republic of Haïti; His Majesty the King of Italy; the President of the Republic of Liberia; the Federal Council of the Swiss Confederation; His Highness the Bey of Tunis,

Being equally animated by the desire to protect effectively, and in as uniform a manner as possible, the rights of authors over their literary and artistic works,

Have resolved to conclude a Convention to that effect, and have named for their Plenipotentiaries, that is to say:

. . . . . .

Who, having communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE I.

The Contracting States are constituted into a Union for the protection of the rights of authors over their literary and artistic works.

[(*a*) *Parliamentary Papers* (Switzerland, No. 1), 1887. See also *Ibid.* (Switzerland, Nos. 1, 2, and 3), 1886. This Convention was laid before Parliament in French and English; and the English appears to be a translation of a French original. It is not always clear that the translation exactly expresses the meaning of the French, especially in Arts. 2 and 5; and the English expressions are throughout not happy: but the editors have not liked to alter them.]

ARTICLE II.

Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin.

The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is granted by law.

For unpublished works the country to which the author belongs is considered the country of origin of the work.

ARTICLE III.

The stipulations of the present Convention apply equally to the publishers of literary and artistic works published in one of the countries of the Union, but of which the authors belong to a country which is not a party to the Union.

ARTICLE IV.

The expression 'literary and artistic works' comprehends books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

ARTICLE V.

Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union.

For works published in incomplete parts ('livraisons') the period of ten years commences from the date of publication of the last part of the original work.

For works composed of several volumes published at intervals,

as well as for bulletins or collections ('cahiers') published by literary or scientific societies, or by private persons, each volume, bulletin, or collection is, with regard to the period of ten years, considered as a separate work.

In the cases provided for by the present Article, and for the calculation of the period of protection, the 31st December of the year in which the work was published is admitted as the date of publication.

ARTICLE VI.

Authorised translations are protected as original works. They consequently enjoy the protection stipulated in Articles II and III. as regards their unauthorized reproduction in the countries of the Union.

It is understood that, in the case of a work for [*sic*] which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers.

ARTICLE VII.

Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical.

This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or *current topics*.

ARTICLE VIII.

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the matter is to be decided by the legislation of the different countries of the Union, or by special arrangements existing or to be concluded between them.

ARTICLE IX.

The stipulations of Article II. apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not.

Authors of dramatic or dramatico-musical works, or their lawful representatives, are, during the existence of their exclusive right of translation, equally protected against the unauthorized public representation of translations of their works.

The stipulations of Article II. apply equally to the public per-

formance of unpublished musical works, or of published works in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance.

Article X.

Unauthorized indirect appropriations of a literary or artistic work, of various kinds, such as *adaptations*, *arrangements of music*, &c., are specially included amongst the illicit reproductions to which the present Convention applies, when they are only the reproduction of a particular work, in the same form, or in another form, with non-essential alterations, additions, or abridgments, so made as not to confer the character of a new original work.

It is agreed that, in the application of the present Article, the tribunals of the various countries of the Union will, if there is occasion, conform themselves to the provisions of their respective laws.

Article XI.

In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other proof, reputed the lawful representative of the anonymous or pseudonymous author.

It is, nevertheless, agreed that the tribunals may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article II.

Article XII.

Pirated works may be seized on importation into those countries of the Union where the original work enjoys legal protection.

The seizure shall take place conformably to the domestic law of each State.

Article XIII.

It is understood that the provisions of the present Convention cannot in any way derogate from the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions

in regard to which the competent authority may find it necessary to exercise that right.

ARTICLE XIV.

Under the reserves and conditions to be determined by common agreement, (*b*) the present Convention applies to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin.

ARTICLE XV.

It is understood that the Governments of the countries of the Union reserve to themselves respectively the right to enter into separate and particular arrangements between each other, provided always that such arrangements confer upon authors or their lawful representatives more extended rights than those granted by the Union, or embody other stipulations not contrary to the present Convention.

ARTICLE XVI.

An international office is established, under the name of "Office "of the International Union for the Protection of Literary and "Artistic Works."

This Office, of which the expenses will be borne by the Administrations of all the countries of the Union, is placed under the high authority of the Superior Administration of the Swiss Confederation, and works under its direction. The functions of this Office are determined by common accord between the countries of the Union.

ARTICLE XVII.

The present Convention may be submitted to revisions in order to introduce therein amendments calculated to perfect the system of the Union.

Questions of this kind, as well as those which are of interest to the Union in other respects, will be considered in conferences to be held successively in the countries of the Union by Delegates of the said countries.

It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries composing it.

ARTICLE XVIII.

Countries which have not become parties to the present Convention, and which grant by their domestic law the protection

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[(*b*) See paragraph 4 of Final Protocol, p. 838.]

of rights secured by this Convention, shall be admitted to accede thereto on request to that effect.

Such accession shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages provided by the present Convention.

ARTICLE XIX.

Countries acceding to the present Convention shall also have the right to accede thereto at any time for their Colonies or foreign possessions.

They may do this either by a general declaration comprehending all their Colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.

ARTICLE XX.

The present Convention shall be put in force three months after the exchange of the ratifications, and shall remain in effect for an indefinite period until the termination of a year from the day on which it may have been denounced.

Such denunciation shall be made to the Government authorized to receive accessions, and shall only be effective as regards the country making it, the Convention remaining in full force and effect for the other countries of the Union.

ARTICLE XXI.

The present Convention shall be ratified, and the ratifications exchanged at Berne, within the space of one year at the latest.

In witness whereof, the respective Plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at Berne, the 9th day of September, 1886.

(L.S.) F. O. ADAMS.
(L.S.) J. H. G. BERGNE.
(L.S.) OTTO VON BÜLOW.
(L.S.) MAURICE DELFOSSE.
(L.S.) COMTE DE LA ALMINA Y CASTRO.
(L.S.) JOSÉ VILLA-AMIL.
(L.S.) EMMANUEL ARAGO.
(L.S.) LOUIS JOSEPH JANVIER.
(L.S.) E. DI BECCARIA.
(L.S.) KŒNTZER.
(L.S.) DROZ.
(L.S.) L. RUCHONNET.
(L.S.) A. D'ORELLI.
(L.S.) L. RENAULT.

Additional Article.

The Plenipotentiaries assembled to sign the Convention concerning the creation of an International Union for the protection of literary and artistic works have agreed upon the following Additional Article, which shall be ratified together with the Convention to which it relates:—

The Convention concluded this day in no wise affects the maintenance of existing Conventions between the Contracting States, provided always that such Conventions confer on authors, or their lawful representatives, rights more extended than those secured by the Union, or contain other stipulations which are not contrary to the said Convention.

In witness whereof, the respective Plenipotentiaries have signed the present Additional Article.

Done at Berne, the 9th day of September, 1886.

(Signed)—(As before.)

Final Protocol.

In proceeding to the signature of the Convention concluded this day, the undersigned Plenipotentiaries have declared and stipulated as follows:—

1. As regards Article IV., it is agreed that those countries of the Union, where the character of artistic works is not refused to photographs, engage to admit them to the benefits of the Convention concluded to-day, from the date of its coming into effect. They are, however, not bound to protect the authors of such works further than is permitted by their own legislation, except in the case of international engagements already existing, or which may hereafter be entered into by them.

It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as contemplated by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private arrangements between those who have legal rights.

2. As regards Article IX., it is agreed that those countries of the Union whose legislation implicitly includes choregraphic works amongst dramatico-musical works, expressly admit the former works to the benefits of the Convention concluded this day.

It is, however, understood that questions which may arise on the application of this clause shall rest within the competence of the respective tribunals to decide.

3. It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyright,

shall not be considered as constituting an infringement of musical copyright.

4. The common agreement alluded to in Article XIV. of the Convention is established as follows:—

The application of the Convention to works which have not fallen into the public domain at the time when it comes into force, shall operate according to the stipulations on this head which may be contained in special Conventions either existing or to be concluded.

In the absence of such stipulations between any countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV. is to be applied.

5. The organization of the International Office established in virtue of Article XVI. of the Convention shall be fixed by a Regulation which shall be drawn up by the Government of the Swiss Confederation.

The official language of the International Office will be French.

The International Office will collect all kinds of information relative to the protection of the rights of authors over their literary and artistic works. It will arrange and publish such information. It will study questions of general utility likely to be of interest to the Union, and, by the aid of documents placed at its disposal by the different Administrations, will edit a periodical publication in the French language treating questions which concern the Union. The Governments of the countries of the Union reserve to themselves the faculty of authorizing, by common accord, the publication by the Office of an edition in one or more other languages, if experience should show this to be requisite.

The International Office will always hold itself at the disposal of members of the Union, with the view to furnish them with any special information they may require relative to the protection of literary and artistic works.

The Administration of the country where a Conference is about to be held will prepare the programme of the Conference with the assistance of the International Office.

The Director of the International Office will attend the sittings of the Conferences, and will take part in the discussions without a deliberative voice. He will make an annual Report on his administration, which shall be communicated to all the members of the Union.

The expenses of the Office of the International Union shall be shared by the Contracting States. Unless a fresh arrangement be made, they cannot exceed a sum of 60,000 fr. a year. This sum may be increased by the decision of one of the Conferences provided for in Article XVII.

The share of the total expense to be paid by each country shall

be determined by the division of the Contracting and acceding States into six classes, each of which shall contribute in the proportion of a certain number of units, viz. :—

First class	... ...	25 units.
Second class	... ...	20 ,,
Third class	... ...	15 ,,
Fourth class	... ...	10 ,,
Fifth class	... ...	5 ,,
Sixth class	... ...	3 ,,

These co-efficients will be multiplied by the number of States of each class, and the total product thus obtained will give the number of units by which the total expense is to be divided. The quotient will give the amount of the unity of expense.

Each State will declare, at the time of its accession, in which of the said classes it desires to be placed.

The Swiss Administration will prepare the Budget of the Office, superintend its expenditure, make the necessary advances, and draw up the annual account, which shall be communicated to all the other Administrations.

6. The next Conference shall be held at Paris between four and six years from the date of the coming into force of the Convention.

The French Government will fix the date within these limits after having consulted the International Office.

7. It is agreed that, as regards the exchange of ratifications contemplated in Article XXI., each Contracting Party shall give a single instrument, which shall be deposited, with those of the other States, in the Government archives of the Swiss Confederation. Each party shall receive in exchange a copy of the *procès-verbal* of the exchange of ratifications, signed by the Plenipotentiaries present.

The present Final Protocol, which shall be ratified with the Convention concluded this day, shall be considered as forming an integral part of the said Convention, and shall have the same force, effect, and duration.

In witness whereof the respective Plenipotentiaries have signed the same.

Done at Berne, the 9th day of September, 1886.

(Signed)—(As before.)]

[The Government of the *United States of America* was not a contracting party to this Convention, but its friendly attitude is shown by the Declaration made by Mr. Winchester, the United States Minister in Switzerland, and contained in the *procès-verbal* of the sitting of the Conference of 6th September, 1886.

From the *procès-verbal* of signature of the 9th September, 1886, and that of deposit of ratifications of the 5th September, 1887, it

appears that the accession of Great Britain, France, and Spain included their Colonies and Dependencies. But Great Britain reserved the power of separate denunciation under Article XX. for India, the Dominion of Canada, Newfoundland, the Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, and New Zealand.]

[INDUSTRIAL PROPERTY.

International Convention for the Protection of Industrial Property, acceded to by Her Majesty's Government on behalf of the United Kingdom, March 17, 1884; *power being reserved to accede, on behalf of the Isle of Man, the Channel Islands and any of Her Majesty's Possessions, on due notice: acceded to by the United States of America as from May 30th*, 1887. (*c*)

His Majesty the King of the Belgians, His Majesty the Emperor of Brazil, His Majesty the King of Spain, the President of the French Republic, the President of the Republic of Guatemala, His Majesty the King of Italy, His Majesty the King of the Netherlands, His Majesty the King of Portugal and the Algarves, the President of the Republic of Salvador, His Majesty the King of Servia, and the Federal Council of the Swiss Confederation,

Being equally animated with the desire to secure, by mutual agreement, complete and effectual protection for the industry and commerce of their respective subjects and citizens, and to provide a guarantee for the rights of inventors, and for the loyalty of commercial transactions, have resolved to conclude a Convention to that effect, and have named as their Plenipotentiaries, that is to say:—

. . . . . .

Who, having communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE I.

The Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Switzerland constitute themselves into a Union for the protection of Industrial Property.

[(*c*) *Parliamentary Papers* (Commercial, No. 28), A.D. 1884: presented in French and English.]

ARTICLE II.

The subjects or citizens of each of the Contracting States shall, in all the other States of the Union, as regards patents, industrial designs or models, trade-marks and trade names, (*d*) enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each State.

ARTICLE III.

Subjects or citizens of States not forming part of the Union, who are domiciled or have industrial or commercial establishments in the territory of any of the States of the Union, shall be assimilated to the subjects or citizens of the Contracting States.

ARTICLE IV.

Any person who has duly applied for a patent, industrial design or model, or trade-mark in one of the Contracting States, shall enjoy, as regards registration in the other States, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

Consequently, subsequent registration in any of the other States of the Union before expiry of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by another registration, by publication of the invention, or by the working of it by a third party, by the sale of copies of the design or model, or by use of the trade-mark.

The above-mentioned terms of priority shall be six months for patents, and three months for industrial designs and models and trade-marks. A month longer is allowed for countries beyond sea.

ARTICLE V.

The introduction by the patentee into the country where the patent has been granted of objects manufactured in any of the States of the Union shall not entail forfeiture.

Nevertheless, the patentee shall remain bound to work his patent in conformity with the laws of the country into which he introduces the patented objects.

[(*d*) "Les brevets d'invention, les dessins ou modèles industriels, les "marques de fabrique ou de commerce, et le nom commercial."]

ARTICLE VI.

Every trade-mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the Union.

That country shall be deemed the country of origin where the applicant has his chief seat of business.

If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin.

Registration may be refused if the object for which it is solicited is considered contrary to morality or public order.

ARTICLE VII.

The nature of the goods on which the trade-mark is to be used can, in no case, be an obstacle to the registration of the trade-mark.

ARTICLE VIII.

A trade name shall be protected in all the countries of the Union, without necessity of registration, whether it form part or not of a trade-mark.

ARTICLE IX.

All goods illegally bearing a trade-mark or trade name may be seized on importation into those States of the Union where this mark or name has a right to legal protection.

The seizure shall be effected at the request of either the proper Public Department or of the interested party, pursuant to the internal legislation of each country.

ARTICLE X.

The provisions of the preceding Article shall apply to all goods falsely bearing the name of any locality as indication of the place of origin, when such indication is associated with a trade name of a fictitious character or assumed with a fraudulent intention.

Any manufacturer of, or trader in, such goods, established in the locality falsely designated as the place of origin, shall be deemed an interested party.

ARTICLE XI.

The High Contracting Parties agree to grant temporary protection to patentable inventions, to industrial designs or models, and trade-marks, for articles exhibited at official or officially recognized International Exhibitions.

ARTICLE XII.

Each of the High Contracting Parties agrees to establish a special Government Department for industrial property, and a central office for communication to the public of patents, industrial designs or models, and trade-marks.

ARTICLE XIII.

An international office shall be organized under the name of "Bureau International de l'Union pour la Protection de la Propriété Industrielle" (International Office of the Union for the Protection of Industrial Property).

This office, the expense of which shall be defrayed by the Governments of all the Contracting States, shall be placed under the high authority of the Central Administration of the Swiss Confederation, and shall work under its supervision. Its functions shall be determined by agreement between the States of the Union.

ARTICLE XIV.

The present Convention shall be submitted to periodical revisions, with a view to introducing improvements calculated to perfect the system of the Union.

To this end Conferences shall be successively held in one of the Contracting States by Delegates of the said States. The next meeting shall take place in 1885 at Rome.

ARTICLE XV.

It is agreed that the High Contracting Parties respectively reserve to themselves the right to make separately, as between themselves, special arrangements for the protection of industrial property, in so far as such arrangements do not contravene the provisions of the present Convention.

ARTICLE XVI.

States which have not taken part in the present Convention shall be permitted to adhere to it at their request.

Such adhesion shall be notified officially through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the others. It shall imply complete accession to all the clauses, and admission to all the advantages stipulated by the present Convention.

ARTICLE XVII.

The execution of the reciprocal engagements contained in the present Convention is subordinated, in so far as necessary, to the observance of the formalities and rules established by the con-

stitutional laws of those of the High Contracting Parties who are bound to procure the application of the same, which they engage to do with as little delay as possible.

Article XVIII.

The present Convention shall come into operation one month after the exchange of ratifications, and shall remain in force for an unlimited time, till the expiry of one year from the date of its denunciation. This denunciation shall be addressed to the Government commissioned to receive adhesions. It shall only affect the denouncing State, the Convention remaining in operation as regards the other Contracting Parties.

Article XIX.

The present Convention shall be ratified, and the ratifications exchanged in Paris, within one year at the latest.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto their seals.

Done at Paris the 20th March, 1883.

(Signed)

(L.S.) Beyens.
(L.S.) Villeneuve.
(L.S.) Duc de Fernan-Nuñez.
(L.S.) P. Challemel-Lacour.
(L.S.) Ch. Hérisson.
(L.S.) Ch. Jagerschmidt.
(L.S.) Crisanto-Medina.
(L.S.) Ressman.
(L.S.) Baron de Zuylen de Nyevelt.
(L.S.) José da Silva Mendes Leal.
(L.S.) F. d'Azevedo.
(L.S.) J.-M. Torres-Caicedo.
(L.S.) Sima M. Marinovitch.
(L.S.) Lardy.
(L.S.) J. Weibel.

Final Protocol.

On proceeding to the signature of the Convention concluded this day between the Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland, for the protection of Industrial Property, the undersigned Plenipotentiaries have agreed as follows:—

1. The words "Industrial Property" are to be understood in their broadest sense; they are not to apply simply to industrial

products properly so called, but also to agricultural products (wines, corn, fruits, cattle, &c.), and to mineral products employed in commerce (mineral waters, &c.).

2. Under the word "patents" are comprised the various kinds of industrial patents recognized by the legislation of each of the Contracting States, such as importation patents, improvement patents, &c.

3. The last paragraph of Article II. does not affect the legislation of each of the Contracting States as regards the procedure to be followed before the tribunals, and the competence of those tribunals.

4. Paragraph 1 of Article VI. is to be understood as meaning that no trade-mark shall be excluded from protection in any State of the Union, from the fact alone that it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that State; provided that on this point it comply with the legislation of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and under reserve of the provisions of the other Articles of the Convention, the internal legislation of each State remains in force.

To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be considered as being contrary to public order in the sense of the last paragraph of Article VI.

5. The organization of the special Department for Industrial Property mentioned in Article XII. shall comprise, so far as possible, the publication in each State of a periodical official paper.

The common expenses of the International Office, instituted by virtue of Article XIII., are in no case to exceed for a single year a total sum representing an average of 2,000 fr. for each Contracting State.

To determine the part which each State should contribute to this total of expenses, the Contracting States, and those which may afterwards join the Union, shall be divided into six classes, each contributing in the proportion of a certain number of units, namely :—

1st class	... ...	25 units.
2nd class	... ...	20 ,,
3rd class	... ...	15 ,,
4th class	... ...	10 ,,
5th class	... ...	5 ,,
6th class	... ...	3 ,,

These co-efficients will be multiplied by the number of States in each class, and the sum of the result thus obtained will supply the number of units by which the total expense has to be divided. The quotient will give the amount of the unit of expense.

The Contracting States are classed as follows, with regard to the division of expense:—

1st class	...	France, Italy.
2nd class	...	Spain.
3rd class	...	Belgium, Brazil, Portugal, Switzerland.
4th class	...	Holland.
5th class	...	Servia.
6th class	...	Guatemala, Salvador.

The Swiss Government will superintend the expenses of the International Office, advance the necessary funds, and render an annual account, which will be communicated to all the other Administrations.

The International Office will centralize information of every kind relating to the protection of Industrial Property, and will bring it together in the form of a general statistical statement which will be distributed to all the Administrations. It will interest itself in all matters of common utility to the Union, and will edit, with the help of the documents supplied to it by the various Administrations, a periodical paper in the French language dealing with questions regarding the object of the Union.

The numbers of this paper, as well as all the documents published by the International Office, will be circulated among the Administrations of the States of the Union, in the proportion of the number of contributing units as mentioned above. Such further copies as may be desired either by the said Administrations, or by Societies or private persons, will be paid for separately.

The International Office shall at all times hold itself at the service of members of the Union, in order to supply them with any special information they may need on questions relating to the international system of Industrial Property.

The Administration of the country in which the next conference is to be held will make preparation for the transaction of that conference, with the assistance of the International Office.

The Director of the International Office will be present at the meetings of the conferences, and will take part in the discussions, but without the privilege of voting.

He will furnish an annual Report upon his administration of the office, which shall be communicated to all the members of the Union.

The official language of the International Office will be French.

7. The present Final Protocol, which shall be ratified together with the Convention concluded this day, shall be considered as forming an integral part of, and shall have the same force, validity, and duration as the said Convention.

In witness whereof the undersigned Plenipotentiaries have drawn up the present Protocol.

(Signed)—(As before.)]

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